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Susan Abramson

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Notes

CRAWLING OUT FROM UNDER BOULDER

Prior to 1982, commentators generally assumed that most municipalities enjoyed antitrust immunity under the Parker v. Brown state action doctrine. In Community Communications Co. v. City of Boulder, however, the Supreme Court held that home rule cities are subject to antitrust review. This Note supports Boulder and examines lower court interpretations of the decision. The Note proposes a reasonableness standard of review of municipal action. It also discusses the recent furor over exposing municipalities to treble damage liability and concludes that Congress should completely abolish trebling.

INTRODUCTION

IN *COMMUNITY Communications Co. v. City of Boulder*,¹ the Supreme Court took another step in its ongoing redefinition of state action immunity²—it extended Sherman Act³ coverage to home rule cities.⁴ For nearly a decade, the Court has been permitting private antitrust suits against parties once thought immune under *Parker v. Brown*.⁵ What one commentator has labeled “antitrust imperialism,”⁶ and another “dwindling sovereign privilege in general,”⁷ has generated a line of cases in which the Court has reconciled state and local regulation with the procompetitive ideals embodied in the federal antitrust statutes.⁸ Broadly, this reconciliation preserves the regulatory prerogatives of the states, while subjecting self-regulation by state subdivisions,⁹ local govern-

1. 455 U.S. 40 (1982).

2. See *infra* note 28.

3. 15 U.S.C. §§ 1-7 (1982).

4. See *infra* note 72.

5. 317 U.S. 341 (1943); see D. MANDELKER, D. NETSCH & P. SALSICH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 484 (2d. ed. 1983) [hereinafter cited as FEDERAL SYSTEM]; Susman & White, *The Perspective of a Plaintiff's Lawyer*, in ANTITRUST & LOCAL GOVERNMENT 22-24 (J. Siena ed. 1982); *infra* notes 28-68 and accompanying text.

6. Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 454 (1981).

7. Spiegel, *Local Governments and the Terror of Antitrust*, 69 A.B.A. J. 163, 166 (1982); see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 977, 984-87 (4th ed. 1971); see also FEDERAL SYSTEM, *supra* note 5, at 435-37; Olson, *Governmental Immunity from Tort Liability—Two Decades of Decline: 1959-1979*, 31 BAYLOR L. REV. 485 (1979).

8. See *infra* notes 35-68 and accompanying text.

9. See *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (state board); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978)

ments,¹⁰ and private parties¹¹ to antitrust review. In *Boulder*, the Court refused to give home rule cities the same status as states.¹² Thus, in the antitrust immunity context, municipalities may now be no different from private parties.¹³

Consistent with the history and policies of state action immunity,¹⁴ the Supreme Court has accurately identified the federalism concerns which spawned *Parker v. Brown* and correctly declined to equate municipalities with states. This Note defends the imposition of antitrust liability on cities and the Court's refusal to shape its contours in *Boulder*. It proposes a reasonableness standard of review, derived from antitrust precedent, whereby local regulatory abuse can be checked.¹⁵ As post-*Boulder* lower court cases indicate, vulnerability to antitrust review will not paralyze local governments.¹⁶

Nonetheless, withdrawal of antitrust immunity automatically exposes cities to treble damage liability,¹⁷ a ramification which frightens local officials and draws fire from the municipal law bar.¹⁸ Although the federal courts have yet to enter an antitrust damage judgment against a city,¹⁹ most commentators have objected to exposing local governments to such crippling liability.²⁰ Further, critics have not confined the assault on treble damages to the municipal context.²¹ This Note submits that the quandary

(same); *Bates v. State Bar*, 433 U.S. 350 (1977) (state bar); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (same).

10. See *Boulder*, 455 U.S. 40 (1982) (home rule city); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (Dillon's rule city).

11. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (state-regulated private utility). Following the Supreme Court's lead in *Bates*, most commentators have categorized the *Parker* cases as involving either "public" or "private" defendants. See *Bates*, 433 U.S. at 361 (distinguishing *Cantor* as involving private parties). For a discussion of the public/private distinction, see *infra* notes 200-12 and accompanying text. One view places *Cantor* in a class by itself, while another holds that *Goldfarb*, *Cantor*, *Fox*, and *Midcal* are all private-party cases. See *infra* notes 89-91 and accompanying text.

12. See *infra* notes 71-75 and accompanying text.

13. See *infra* notes 87-94 and accompanying text.

14. See *infra* notes 97-126 and accompanying text.

15. See *infra* notes 168-93 and accompanying text.

16. See *infra* notes 77-92 and accompanying text.

17. Once the immunity cloak is removed, the defendant is exposed to the antitrust laws, including § 4 of the Clayton Act, 15 U.S.C. § 15 (1982): "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

18. See *infra* notes 177-78 and accompanying text.

19. See *infra* note 139.

20. See *infra* note 196.

21. See *infra* notes 213-19 and accompanying text.

over municipal antitrust liability is a sure indication of underlying dissatisfaction with treble damages in general.²² Therefore, this Note recommends against judicial obviation of the remedy problem by ensuring broad immunity for local entities, or congressional exemption of cities from treble damage liability. Rather, this Note proposes that Congress abolish trebling altogether.²³ Cities, like private parties, should be required to obey the antitrust laws and respond in damages. But no defendant should be saddled with paying windfall damage awards, including attorney's fees, to private plaintiffs.

I. BOULDER IN CONTEXT

In 1979, Boulder, Colorado passed an ordinance imposing a three-month freeze on cable television expansion within its boundaries.²⁴ The result was an antitrust suit against the city. The holder of a twenty-year, revocable, nonexclusive permit to provide the city with cable claimed that enforcement of the ordinance would violate the Sherman Act and should be enjoined.²⁵

The city argued that its home rule status equated its action with that of the sovereign State of Colorado and that it therefore enjoyed immunity under the *Parker v. Brown* doctrine. Alternatively, the city urged that the home rule provision of the Colorado Constitution enabled, authorized, and thereby immunized the city's action.²⁶ The Supreme Court rejected both contentions.²⁷ An appreciation of the issues raised, the Court's resolution, and the debates which followed requires an initial consideration of *Boulder* in context.

A. Background: From *Parker* to *Midcal*

From the birth of the state action doctrine²⁸ in *Parker v. Brown* until 1975, municipal immunity from antitrust attack was

22. See *infra* notes 200-12 and accompanying text.

23. See *infra* notes 220-33 and accompanying text.

24. 455 U.S. at 45-46.

25. *Id.* at 47.

26. *Id.* at 52.

27. *Id.* at 53, 56.

28. The Supreme Court interchanges the terms "state action exemption," "*Parker* state action exemption," "*Parker* doctrine," and "state action doctrine" in treating the antitrust immunity of states and their agents and instrumentalities. See, e.g., *Boulder*, 455 U.S. at 40, 43, 47, 53, 62. Because the term "exemption" has been labeled inaccurate, *id.* at 62 (Rehnquist, J., dissenting); *infra* note 98, this Note employs the term "immunity."

tacitly surmised.²⁹ In *Parker*, the Court had refused to enjoin state administrators from enforcing a New-Deal-styled marketing program for California's raisin crop which, the Court assumed, would have violated the Sherman Act had it been "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate."³⁰ Finding no indication in the Sherman Act or its history that Congress intended to restrain action which "derived its authority and efficacy from the legislative command of the state,"³¹ the Court upheld the California program in a brief, much-quoted opinion by Chief Justice Stone.

1. *Parker: Federalism and the Sherman Act*

The lynchpin of the *Parker* opinion is federalism. The Court assumed that Congress under its commerce power could have "preempted the field," thereby prohibiting the states from engaging in market regulation.³² Congress had not done so, nor had it addressed state action in the floor debates or in the Sherman Act itself, which Chief Justice Stone construed in light of federalism principles: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."³³ Congressional indirection, according to Justice Stone, placed federalism constraints on the Supreme Court, requiring it to conclude that the Sherman Act "must be taken to be a prohibition of individual and not state action."³⁴

2. *The Parker Doctrine Arises in the Seventies*

Between 1943 and 1975, the Supreme Court barely acknowl-

29. See FEDERAL SYSTEM, *supra* note 5, at 484; Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 481-82 (1982); Howard, *The Perspective of a Defendant's Lawyer*, in ANTITRUST & LOCAL GOVERNMENT 34 (J. Siena ed. 1982); Comment, *Alternative Approaches to Municipal Antitrust Liability*, 11 FORDHAM URB. L.J. 51, 51 & n.4 (1982); see also Note, *The Antitrust Liability of Municipalities Under the Parker Doctrine*, 57 B.U.L. REV. 368, 379-81 & n.68 (1977) (assumed extension of *Parker* to municipalities resulted in dearth of precedent for 30 years).

30. 317 U.S. at 344, 350.

31. *Id.* at 350-51.

32. *Id.* at 350.

33. *Id.* at 351.

34. *Id.* at 352.

edged the *Parker* doctrine's existence.³⁵ Then, in *Goldfarb v. Virginia State Bar*, the Court read *Parker* as limiting the scope of immunity to conduct *required by state command*.³⁶ The Court found no such mandate to the state bar, whose fee schedule, it held, violated section 1 of the Sherman Act.³⁷

Goldfarb marked the beginning of the Court's commitment to addressing and defining *Parker's* state action concept.³⁸ The following year, in *Cantor v. Detroit Edison Co.*, the Court refused to immunize a regulated private utility which had allegedly tied the sale of lightbulbs to electric service according to a program approved by the state commission.³⁹ Quoting *Goldfarb*, the Court emphasized that state compulsion was the essential immunity ingredient and that the state had not compelled the unlawful tie-in.⁴⁰

In 1977, the Court subtly recast the compulsion requirement in terms of state supervision and articulated policy.⁴¹ Distinguishing *Cantor* as involving private parties,⁴² the *Bates v. State Bar* Court stressed that the Arizona Supreme Court continuously supervised the challenged ban on attorney advertising and was the "real party in interest."⁴³ Moreover, the state bar had imposed the restraint via disciplinary rules reflecting "a clear articulation of the

35. Comment, *State Action Immunity and the Compulsion Requirement: Joint Ratemaking in Intrastate Trucking*, 71 CAL. L. REV. 1557, 1560 (1983); see also Note, *Community Communications Co. v. City of Boulder: The Emasculation of Municipal Immunity from Sherman Act Liability*, 32 CATH. U.L. REV. 413, 419 & n.51 (1983) (vagueness of *Parker's* state action definition led to split in courts which Supreme Court ignored for over 30 years).

36. 421 U.S. 773, 790 (1975).

37. *Id.* at 788, 791.

38. For a thorough review of the recent line of authority *Goldfarb* initiated, see Richards, *Exploring the Far Reaches of the State Action Exemption: Implications for Federalism*, 57 ST. JOHN'S L. REV. 274, 280-309 (1983).

39. 428 U.S. 579, 581 (1976).

40. *Id.* at 592-93 n.28.

41. In *Bates v. State Bar*, 433 U.S. 350, 362 (1977), the Court had "deem[ed] it significant that the state policy [was] so clearly and affirmatively expressed and that the State's supervision [was] so active." The Court later summarized *Bates*:

In holding the antitrust laws inapplicable, *Bates* noted that "[t]hat court [the Arizona Supreme Court] is the ultimate body wielding the State's power . . . and, thus, the restraint is 'compelled by direction of the State acting as sovereign.' . . . We emphasized, moreover, the significance to our conclusion . . . that the state policy requiring the anticompetitive restraint as part of a comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state policy, . . . actively supervised by the State Supreme Court as the policymaker.

City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (plurality opinion of Brennan, J.) (quoting *Bates*, 433 U.S. at 360) (citations omitted).

42. *Bates*, 433 U.S. at 361-62.

43. *Id.* at 361.

State's policy with regard to professional behavior."⁴⁴ The Court concluded that *Parker v. Brown* barred the Sherman Act claim.⁴⁵ The *Bates* Court's emphasis on state supervision and articulated policy formed the basis for subsequent *Parker* interpretations.

In 1978, the Supreme Court confronted two municipalities claiming blanket antitrust immunity solely because of their status "as cities and subdivisions of the State of Louisiana."⁴⁶ It should have surprised no one that the Court rejected the cities' expansive reading of *Parker*.⁴⁷ Yet, many were surprised.⁴⁸ *City of Lafayette v. Louisiana Power & Light Co.* produced a rash of conferences⁴⁹ and a spate of commentary⁵⁰ which criticized, reformulated, and generally attempted to make sense out of five opinions from a sharply divided Court.

Justice Brennan, writing for a plurality, flatly rejected the notion that cities are themselves sovereign, concluding that neither *Parker* nor analogous case law required giving cities the deference due states.⁵¹ In denying blanket immunity to cities, Justice Brennan explained that "serious economic dislocation . . . could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws."⁵² Nevertheless, the plurality did not abolish municipal antitrust immunity⁵³ but instead allowed cities to invoke *Parker's* protection by

44. *Id.* at 362.

45. *Id.* at 363.

46. *Lafayette*, 435 U.S. at 392, 408 (defendant power company counterclaimed for various antitrust violations cities allegedly committed in operating municipally owned power plants).

47. See Troy, *Competition and Antitrust*, in ANTITRUST & LOCAL GOVERNMENT 136 (J. Siena ed. 1982).

48. See Rose, *An Overview: Municipal Antitrust Liability*, 1980 ARIZ. ST. L.J. 245, 245-46.

49. See *id.* at 248 & nn.13-14.

50. See, e.g., Areeda, *supra* note 6; Bangasser, *Exposure of Municipal Corporations to Liability for Violations of the Antitrust Laws: Antitrust Immunity After the City of Lafayette Decision*, 11 URB. LAW. vii (1979); Curtin, *Antitrust Comes to the Cities—Analysis of City of Lafayette v. Louisiana Power & Light Co. and Its Effect on Municipal Antitrust Liability*, 5 U. DAYTON L. REV. 7 (1980); Taurman, *Reflections on City of Lafayette: Applying the Antitrust "State Action" Exemption to Local Governments*, 13 URB. LAW. 159 (1981); Note, *The Application of the Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979).

51. 435 U.S. at 412.

52. *Id.* at 412-13.

53. The four-Justice plurality declined to immunize cities "in the absence of evidence that the State authorized or directed a given municipality to act as it did." *Id.* at 414. The plurality elaborated:

[A] subordinate governmental unit's claim to *Parker* immunity is not as readily established as the same claim by a state government. . . . [A]n adequate state mandate for anticompetitive activities of cities . . . exists when it is found "from the

showing that their "anticompetitive conduct [was] engaged in . . . pursuant to state policy to displace competition with regulation or monopoly public service."⁵⁴ Justice Brennan emphasized that *Goldfarb* and *Bates* required a "clearly articulated and affirmatively expressed" state policy, "actively supervised" by the state as sovereign.⁵⁵

Casting the swing vote, Chief Justice Burger concurred in the judgment on the ground that the challenged conduct involved a "proprietary" and not a "governmental" function.⁵⁶ Justice Stewart attacked this distinction in dissent. Insisting that Congress never intended to subject "governmental actions" to the Sherman Act, he deemed the proper distinction to be between government and private parties.⁵⁷ Furthermore, he prophesied that subjecting cities to the antitrust laws would "impair the ability of a State to delegate," "cause excessive judicial interference" with state decisionmaking, and "impose staggering costs on . . . municipal governments."⁵⁸ The fragmented *Lafayette* Court was unable to provide adequate guidance to lower courts, which expressed difficulty in applying the decision.⁵⁹ Thus, many of the same concerns resurfaced four years later in *Boulder*.

authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."

Id. at 415 (quoting opinion below, 532 F.2d 431, 434 (5th Cir. 1976)) (emphasis added). The italicized language was later read into *Boulder* by lower courts. See *infra* notes 77-81 and accompanying text.

54. 435 U.S. at 413.

55. *Id.* at 410; see *supra* note 41.

56. 435 U.S. at 422-24; see *infra* notes 69-70 and accompanying text.

57. 435 U.S. at 428-30. Justice Stewart, joined by three of his brethren, argued further that the state compulsion requirement is appropriate only when "private persons claim that their anticompetitive actions are not their own but the State's." *Id.* at 431-32. Were the Court to adopt the governmental/proprietary distinction rather than the public/private distinction, he argued that it would become trapped in the "quagmire" . . . [of a distinction] 'so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation.'" *Id.* at 433 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 65-68 (1955) (tort immunity)); see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1140 n.359 (1980).

58. 435 U.S. at 438, 440. Justice Blackmun, who joined all but Part II-B of the Stewart dissent (excessive judicial interference), filed his own dissent attacking the Court for making "governmental units potentially liable for massive treble damages." *Id.* at 442-43.

59. *E.g.*, *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1195 (6th Cir. 1981) (construing Ohio Constitution as immunizing city from antitrust challenge to its waste disposal landfill operation), *vacated and remanded in light of Boulder*, 455 U.S. 931 (1982): "It is difficult for us to apply the *Lafayette* decision since the plurality and dissenting opinions are each supported by four justices, and no line of reasoning commands a majority of the Court." For the lineup of the *Lafayette* Court, see *infra* note 65.

3. *The Midcal Test*

In the interim between *Lafayette* and *Boulder*, the Supreme Court twice applied the *Parker* doctrine to private parties claiming that their anticompetitive conduct was protected state action. In *New Motor Vehicle Board v. Orrin W. Fox Co.*, the Court deflected an antitrust assault on a California statute.⁶⁰ The statute's imposition of a system of restraints on auto dealership franchises was permissible because, according to the Court, the state board actively reviewed individual cases and operated according to a clear state policy to displace competition.⁶¹

Two years later, in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, a unanimous Supreme Court affirmed a state court order enjoining enforcement of a state statute endorsing resale price restrictions on wine.⁶² The restrictions, established by an association of private producers and wholesalers, were state-authorized and enforced by a state agency. Nevertheless, since the state itself neither set nor reviewed the prices, the Court refused to allow "[t]he national policy in favor of competition [to] be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."⁶³ Quoting the *Lafayette* plurality, Justice Powell introduced the two-part *Midcal* test for *Parker* immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second the policy must be 'actively supervised' by the State itself."⁶⁴

In *Fox* and, particularly, in *Midcal*, the Court refined the analytical framework of the *Lafayette* plurality and synthesized prior decisions into a single test. This helped the Justices to consolidate their positions on municipal antitrust immunity.⁶⁵ In 1982, in a

60. 439 U.S. 96, 110 (1978). The statute gave the board authority to delay or deny franchisors permission to relocate dealerships, and gave competing franchisees the right to a board hearing upon filing notice of protest. *Id.* at 104.

61. *Id.* at 110. The Court held that "[p]rotesting dealers who invoke in good faith their statutory right to . . . a Board determination . . . do not violate the Sherman Act." *Id.* The *Fox* Court consisted of a six-member majority, two concurring Justices, and a dissenter.

62. 445 U.S. 97, 100-02 (1980).

63. *Id.* at 106.

64. *Id.* at 105 (quoting 435 U.S. at 410). Although the first requirement was satisfied, the Court held that the second was not. *Id.* at 105-06.

65. Compare *Lafayette*, 435 U.S. 389 (1978) (Justice Brennan's opinion for Court (Part I) was joined by Chief Justice Burger and Justices Powell, Stevens, and Marshall (who separately concurred); Parts II and III (legal analysis) were joined by Justices Powell, Stevens, and Marshall; Chief Justice Burger concurred in judgment; Justice Stewart's dissent

five-to-three decision, the Court held that *Parker v. Brown* did not shield Boulder, Colorado from a Sherman Act challenge to its cable television moratorium ordinance. The city failed to satisfy the "clearly articulated and affirmatively expressed" requirement of *Midcal*.⁶⁶ Antitrust immunity, which local governments enjoyed by default for over thirty years, was thus cut back. Availability of the *Parker* shield currently hinges on a city's ability to demonstrate that it is acting as or for the state⁶⁷—to do so the city must satisfy at least the first prong of the *Midcal* test.⁶⁸

B. Boulder: Clarification and Confusion

The Court settled two issues in *Boulder*. First, it dismissed in footnotes the city's contention, based on the Chief Justice's *Lafayette* concurrence, that it was immune because cable television regulation is a governmental, not a proprietary activity.⁶⁹ By failing

was joined by Justices White, Rehnquist, and Blackmun (who joined in all but Part II-B and filed separate dissent)), with *Boulder*, 455 U.S. 40 (1982) (Justice Brennan's opinion for Court was joined by Justices Marshall, Blackmun, Powell, and Stevens (who separately concurred); Justice Rehnquist's dissent was joined by Chief Justice Burger and Justice O'Connor; Justice White took no part). See Richards, *supra* note 38, at 296-300 (interpreting *Fox* and *Midcal* as indicating that consensus returned to Court after *Lafayette*).

66. 455 U.S. at 51.

67. Just how a city proves this remains unanswered after *Boulder*. Sullivan, *Antitrust Laws and the Evolution of the State Action Doctrine*, in ANTITRUST & LOCAL GOVERNMENT 17 (J. Siena ed. 1982). According to Professor Sullivan, "*City of Boulder* tells us nothing . . . about how the standards that thus far have been developed for state action are to apply to municipalities."

68. 455 U.S. at 51-52 n.14 (declining to decide whether active state supervision requirement applies to cities). The Supreme Court will address the *Midcal* test again in *Hoover v. Ronwin*, which was argued before it on January 16, 1984. See *Arguments Before the Court—Attorneys—Antitrust liability of bar examiners*, 52 U.S.L.W. 3559, 3559-60 (1984) (editorial summary of argument). In *Ronwin v. State Bar*, 686 F.2d 692 (9th Cir. 1981), *cert. granted sub nom.* *Hoover v. Ronwin*, 103 S. Ct. 2084 (1983), plaintiff alleged that the Arizona State Bar used its examination procedures to restrict bar admissions to a predetermined quota. The Ninth Circuit reversed an order dismissing his claim against the state supreme court's examination committee for violating the Sherman Act in conducting and grading the 1974 examination (which plaintiff failed). *Id.* at 694-95.

Before the Supreme Court, the committee members argued that they were immune, having engaged in state action either as sovereign, as a state subdivision, or as "exempt private parties." Plaintiff's key argument against immunity was inadequate state supervision. 52 U.S.L.W. at 3559. Justice White, who did not participate in the *Boulder* decision, "suggested that state passivity . . . [is] present in this case in view of the broad discretion given to the committee." *Id.* His comments indicate that as many as six Justices might conclude that the committee receives insufficient state supervision to merit antitrust immunity. Since *Ronwin* does not involve cities, it may not shed much light on applying the *Midcal* requirements to local municipal governments, as the Court has implied that "the fact that the governmental bodies sued are cities . . . has significance." *Lafayette*, 435 U.S. at 414 (in context of need for state authorization or direction).

69. 455 U.S. at 49 & n.13 (quoting *Lafayette*, 435 U.S. at 422, 424 (Burger, C.J., con-

to adopt the governmental/proprietary test, the *Boulder* Court implicitly confirmed that the nature of a municipality's authority, not the nature of its activity, is the crucial inquiry.⁷⁰

Second, the Court decided a threshold question unanswered by *Lafayette*⁷¹—whether home rule status or powers⁷² conferred

curing)), 55 & n.18; see Areeda, *supra* note 6, at 443 (distinction unworkable in other areas).

70. See 455 U.S. at 49 & n.13 (quoting *Lafayette*, 435 U.S. at 422, 424 (Burger, C.J., concurring)), 55 & n.18.

71. The municipalities in *Lafayette* were "Dillon's rule" cities, defined by Justice Stewart in his dissent in that case as "'instrumentalities of the State for the convenient administration of government within their limits.' They have only such powers as are delegated them by the State" 435 U.S. at 429 (quoting *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883)) (citation omitted). The majority of American cities, however, enjoy varying degrees of home rule autonomy, which may have accounted for the failure of courts, municipal lawyers, and commentators to recognize *Lafayette* as sounding the death knell for blanket municipal antitrust immunity. See, e.g., *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) (city immune by virtue of home rule authorization), *vacated and remanded in light of Boulder*, 455 U.S. 931 (1982); Areeda, *supra* note 6, at 448-49; Freilich & Carlisle, *The Community Communications Case: A Return to the Dark Ages Before Home Rule*, 14 URB. LAW. v, v-vi (1982). Some disagreement surrounds the extent of the home rule movement. FEDERAL SYSTEM, *supra* note 5, at 103 ("Although some forty states by now have constitutional home rule provisions, one study indicated that home rule powers were vigorously exercised only in about a dozen states.") (citing Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975)); see also Note, *Home Rule and the Sherman Act After Boulder: Cities Between a Rock and a Hard Place*, 49 BROOKLYN L. REV. 259, 262-63 n.24 (1983) (listing constitutional provisions state by state).

72. Home rule generally involves a "grant of power to a local government to frame and adopt a charter of government, although occasionally it is employed also to refer to a direct constitutional grant of legislative power." F. MICHELMAN & T. SANDALOW, *MATERIALS ON GOVERNMENT IN URBAN AREAS* 302 (1970). The authors point out that home rule powers are vaguely defined by constitutions and statutes, *id.* at 308, giving municipalities the initiative to act in local matters subject to judicial determination of whether the city has exceeded the bounds of its initiative. *Id.* at 309-10.

In constitutional home rule states, home rule also serves as a limitation on the state legislature's power to interfere in "purely local" affairs. Colorado is one of a few states whose constitutions expressly provide for this limitation. *Id.* at 349-50. The balance of state and local powers is often depicted schematically:

The courts have, in effect, divided legislative power into three "areas." First, an area in which local governments may legislate only if power has been delegated by the legislature, often termed the area of "exclusively state-wide concern." Second, an area of "purely local concern" in which the legislature is either forbidden to act or [as in Colorado] in which local law prevails over inconsistent state law. . . . Third, an area of so-called "mixed state and local concerns" in which both local and state governments are competent to legislate but in which local law is superseded by inconsistent state legislation.

Id. at 352; see also FEDERAL SYSTEM, *supra* note 5, at 101-05; Cirace, *supra* note 29, at 490 & n.51; Note, *supra* note 71, at 261-65.

In *Boulder*, the city argued that cable television regulation was a purely local concern, a stance which the Supreme Court rejected by assuming that the district court had correctly determined that the matter embraced "wider concerns, including interstate commerce . . .

blanket antitrust immunity on cities. The Court quickly dismissed the status argument, reiterating its *Lafayette* premise that cities are not themselves sovereign. It concluded that the home rule amendment to the Colorado Constitution had not imbued Colorado's cities with state sovereignty and its accompanying *Parker* immunity.⁷³ The Court then focused on the powers issue: whether the broad, unspecified grant of home rule powers reflected a "clear articulation and affirmative expression" of state policy to displace competition in cable television.⁷⁴ The Court answered in the negative, concluding that the first prong of *Midcal*'s test "is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive."⁷⁵

1. *The Persistent "Contemplation" Test of Lafayette*

Nonetheless, the *Boulder* decision raised as many questions as it answered about application of the *Midcal* formula to cities.⁷⁶

[and] the First Amendment rights of communicators.'" 455 U.S. at 43, 47 (quoting 485 F. Supp. 1035, 1038-39 (D. Colo. 1980)).

73. 455 U.S. at 52-54.

74. *Id.* at 54-55.

75. *Id.* at 55 (emphasis in original). Justice Brennan wrote for the Court: "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly vicerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.* at 56.

76. Besides disagreeing over the mechanics of applying *Midcal*, courts are split over whether the *Midcal* test is a further specification of the compulsion requirement of *Goldfarb* and *Cantor*. See Areeda, *supra* note 6, at 438 & n.19. Those which use the compulsion label apply *Midcal*'s standards strictly; those which reject it apply the standards liberally. Compare *United States v. Southern Motor Carriers Rate Conf.*, 702 F.2d 532 (5th Cir. 1983) (compulsion required for private carriers; no immunity), and *Ronwin v. State Bar*, 686 F.2d 692 (9th Cir. 1981) (compulsion required for governmental entities; no immunity), *cert. granted sub nom. Hoover v. Ronwin*, 103 S. Ct. 2084 (1983), with *First Am. Title Co. v. South Dakota Land Title Ass'n*, 714 F.2d 1439 (8th Cir. 1983) (compulsion not required for state agencies or subdivisions; immunity), and *Gold Cross Ambulance v. City of Kan. City*, 705 F.2d 1005, 1012 n.11 (8th Cir. 1983) (dismissing compulsion in footnote; immunity).

Courts have not applied the compulsion standard to municipal defendants. *Southern Motor Carriers*, 702 F.2d at 537 (dictum); e.g., *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Gold Cross Ambulance*, 705 F.2d at 1012 n.11; *Town of Hallie v. City of Eau Claire*, 700 F.2d 376, 382 (7th Cir. 1983); see Areeda, *supra* note 6, at 445 & nn.49-50 (compulsion not required of governmental defendants); Comment, *supra* note 35, at 1561-62:

[I]t appears that the Court developed the *Midcal* standards for use with public defendants such as . . . [a] city government At the same time, the Court contemplated that private defendants such as the bar association in *Goldfarb*, and the trucking industry . . . should satisfy the compulsion requirement as well as the *Midcal* standards

As to the first prong, precisely what constitutes "clear articulation and affirmative expression" remains obscured. One cause for confusion is the *Boulder* Court's passing reference to a passage from *Lafayette*. Stressing that immunity requires more than state neutrality, Justice Brennan had added: "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought."⁷⁷

Lower courts have thus interpreted *Boulder* as incorporating *Lafayette*'s "contemplation" standard with all its baggage.⁷⁸ Some courts have seized upon *Lafayette*'s language and Professor Phillip Areeda's analysis⁷⁹ to find a "clear articulation and affirmative expression" by implication.⁸⁰ Despite the *Boulder* Court's refusal to permit the requisite legislative intent to be "inferred, 'from the authority given' to Boulder 'to operate in a particular area,'"⁸¹ courts have immunized parties whose anticompetitive conduct is shown to have been "contemplated" by a state legislature as a "reasonable or foreseeable consequence" of engaging in statutorily authorized activity.⁸² Reading the contemplation standard into *Boulder* has permitted extremely loose interpretations of "clear articulation and affirmative expression,"⁸³ which seem to

77. 455 U.S. at 55.

78. *E.g.*, *City of N. Olmstead v. Greater Cleveland Regional Transit Auth.*, 722 F.2d 1284, 1288 (6th Cir. 1983); *Parks v. Watson*, 716 F.2d at 663; *Central Iowa Refuse Sys. v. Des Moines Metro. Solid Waste Agency*, 715 F.2d 419, 426-27 (8th Cir. 1983); *Gold Cross Ambulance*, 705 F.2d at 1012-13; *Town of Hallie*, 700 F.2d at 381; see Civiletti, *The Fallout from Community Communications Co. v. City of Boulder: Prospectus for a Legislative Solution*, 32 CATH. U.L. REV. 379, 384 (1983); *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 268, 270-71 (1982) [hereinafter cited as *1981 Term*]. But see Comment, *supra* note 29, at 62 (*Boulder* Court abandoned contemplation standard).

79. 435 U.S. at 415 (quoting opinion below, 532 F.2d 431, 434 (5th Cir. 1976)) ("This does not mean . . . that a political subdivision necessarily must . . . point to a specific, detailed legislative authorization. . . . [A]n adequate state mandate . . . exists when it is found 'from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'"); see Areeda, *supra* note 6, at 455-46.

80. *Central Iowa*, 715 F.2d at 426-427; *First American Title*, 714 F.2d at 1454-55; *Gold Cross Ambulance*, 705 F.2d at 1012-13; *Town of Hallie*, 700 F.2d at 381; *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 276 n.8 (9th Cir. 1982).

81. 455 U.S. at 55 (quoting *Lafayette*, 435 U.S. at 394).

82. See cases cited *supra* note 78.

83. In *Central Iowa*, for example, a sanitary landfill operator sued the metropolitan waste agency, 15 municipalities, and a county for Sherman Act violations arising out of the agency's requirement that (as long as revenue bonds were outstanding) all solid waste generated in its geographic area be disposed of at its facility. Plaintiff argued that the authorizing state statutes were to ensure the project's financial success and thus the agency's restraint was not contemplated. The court responded "that notwithstanding the statutes'

believe the very words the Supreme Court uses to label this

silence on the specific matter of monopolization, it is possible to infer the existence of an affirmative state policy permitting anticompetitive practices in the operation of municipal landfills." 715 F.2d at 426.

To plaintiff's contention that "a State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions," *id.* (quoting *Boulder*, 455 U.S. at 55), the court responded that "although the State has left Iowa municipalities with a range of options . . . by no means has [it] adopted an approach of indifference or 'mere neutrality.'" 715 F.2d at 427. To conclude that the Iowa legislature contemplated the restrictions was not an "unwarranted leap." Rather,

[w]hen ascertaining what was in the minds of the legislators, we cannot ignore the realities of the municipal bond market in the mid 1970's. . . . Common sense and experience suggest that the Iowa legislature must have intended Metro to have the latitude necessary to impose restrictions on competition if Metro believed such restrictions necessary to promote the sale of the bonds. . . . Thus, we believe that the restraint on competition was a "necessary or reasonable consequence" of engaging in the authorized activity

Id. (quoting *Gold Cross Ambulance*, 705 F.2d at 1013).

In *Town of Hallie*, plaintiff towns alleged that the city's conditioning of sewage treatment services on annexation was a means of leveraging its monopoly power over sewage treatment to monopolize sewage collection and transportation. 700 F.2d at 378. The court relied upon two state statutes. One authorized the city to decide where to extend its sewage treatment service. The other permitted "the department of natural resources [to] order a city to extend its sewerage system to a town, but if that town then refused to become annexed . . . the order [would become] void." *Id.* at 382. The court held that *Boulder's* "clear articulation and affirmative expression" requirement had been met, *id.* at 383, and relied on *Lafayette* "contemplation":

[I]f we can determine that the state gave the City authority to operate in the area of sewage services and to refuse to provide treatment services, then we can assume that the State contemplated . . . the anticompetitive effect that is a reasonable or foreseeable consequence of engaging in the authorized activity.

Id. at 381.

At least one court, while accepting the "contemplation" standard, has demanded more than the "reasonable consequence" inference. In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), the city of Klamath Falls, Oregon had conditioned permission to vacate platted streets on plaintiff developer's relinquishment of its constitutional right to just compensation for its geothermal wells. The city denied permission when plaintiff refused to dedicate the land containing the wells. The court declined to shield the city from plaintiff's Sherman Act suit:

From our reading of the statute, it is questionable whether the legislature intended to create such monopolistic control. . . . However, even assuming that such a monopoly proviso is implicitly authorized and can be said to be "clearly articulated and affirmatively expressed as state policy," . . . merely demonstrating a state policy to displace competition with monopoly public service does not necessarily satisfy the additional requirement that the legislature contemplated the kind of action complained of. . . . As the plurality stated in *Lafayette*, "even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." . . .

There is nothing in [the statute] which would allow us to infer that any authorization by the state to displace competition with city-run geothermal districts also includes authorization for a city to undertake anticompetitive actions in its efforts to establish such a district.

Id. at 663-64 (citations omitted).

Other courts have ignored the contemplation language altogether, focusing instead on whether the state has *compelled* the anticompetitive activities. See *United States v. South-*

requirement.⁸⁴

2. Prognosis for "Active Supervision" and Cities

Broadbased immunity was also facilitated by the *Boulder* Court's failure to apply *Midcal*'s second prong—the "active supervision" requirement. Reading the test in the conjunctive, the Court did not reach the second question because Boulder's ordinance had not survived the first.⁸⁵ Thus, debate continues among the circuit courts and the commentators over active supervision.⁸⁶

A close reading of *Boulder* suggests that the Court eventually will apply this requirement to cities, and circuit court cases indicate that it will be interpreted liberally. Even as the *Boulder* Court leaned heavily on the *Lafayette* plurality, it relied equally on more recent precedent where the test was set forth and both prongs applied⁸⁷—in *Fox* and *Midcal*, presence or absence of state supervision had been determinative.⁸⁸ This, coupled with the Court's failure to distinguish the "public" City of Boulder from the "private" parties claiming immunity in *Midcal*,⁸⁹ has con-

ern Motor Carriers Rate Conf., 702 F.2d 532, 534 (5th Cir. 1983) (*Midcal* required compulsion; *Lafayette* and *Boulder* distinguished as involving municipal activities); *Ronwin*, 686 F.2d at 696 (record insufficient to determine whether state supreme court had subjective knowledge of bar grading procedures; delegation of powers to court-selected committee, without more, does not satisfy *Midcal*'s two-part test for compulsion); *supra* note 76.

84. Justice Stewart identified the fundamental weakness of the contemplation test in his *Lafayette* dissent:

[S]tate statutes often are enacted with little recorded legislative history, and the bare words of a statute will often be unilluminating in interpreting legislative intent. For example, do the Louisiana statutes permitting the petitioners to operate public utilities "contemplate" that the petitioners might tie the sale of gas to the sale of electricity? Do those statutes, indeed, "contemplate" that electric service will be provided to city residents on a monopoly basis? Without legislative history or relevant statutory language, any answer to these questions would be purely a creation of judicial imagination.

435 U.S. at 437.

85. 455 U.S. at 51-52 & n.14; see *Ronwin*, 686 F.2d at 696 ("failure to meet either requirement precludes application of . . . antitrust immunity").

86. See, e.g., *Gold Cross Ambulance*, 705 F.2d 1005 (8th Cir. 1983); Richards, *supra* note 38, at 309-13; Susman & White, *supra* note 5, at 24; Note, *supra* note 71, at 287-88; Comment, *supra* note 29, at 52 & n.6, 62-63; cf. *Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 994-96 (3d Cir. 1982) (active supervision satisfied by state commission's oversight of fees, since state supreme court had upheld fee setting as within legislative intent); *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-76 (9th Cir. 1982) (supervision by board satisfied *Midcal* requirement).

87. 455 U.S. at 51-52 & n.14, 54 (stressing *Fox* and *Midcal*; ignoring *Goldfarb* and *Cantor*).

88. See *supra* notes 60-64 and accompanying text.

89. See 455 U.S. at 56 ("[The antitrust] laws, like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other

vinced some writers that both parts of the *Midcal* formulation should apply to municipal defendants.⁹⁰

Most courts ruling on the applicability of state supervision to municipal defendants have derived a public/private distinction from the *entire* line of state action cases. Under this view, cities are classified as public for purposes of the active supervision requirement, *Midcal* is distinguished on its facts as involving private parties,⁹¹ and immunity is preserved. The courts typically support this outcome with policy: State delegation would be frustrated by federal intrusion; cities, themselves governments, do not need state oversight; cities should not be forced to sacrifice power and autonomy for antitrust immunity.⁹²

While identifying defendants as public was crucial to the result in *Parker v. Brown*,⁹³ these courts have drawn the public/private line too close to the local end of the spectrum. For, as Justice Brennan stressed in *Lafayette* and again in *Boulder*, *Parker's*

corporate entities."); Slater, *Local Governments and State Action Immunity After City of Lafayette and City of Boulder*, 51 ANTITRUST L.J. 349, 358 (1982); Sullivan, *supra* note 67, at 17; cf. Cirace, *supra* note 29, at 489 (although Court has not said so expressly, *Boulder* holding and *Lafayette* dictum suggest possibility that "municipalities are no more entitled to special consideration under the antitrust laws than are private parties"). The *Boulder* dissent also read the majority as having equated cities with private parties for antitrust immunity purposes. 455 U.S. at 60 (Rehnquist, J., dissenting).

90. Howard, *supra* note 29, at 36; Susman & White, *supra* note 5, at 24; Comment, *supra* note 29, at 52 & n.6, 62-63.

91. *Gold Cross Ambulance*, 705 F.2d at 1014 (*Midcal*, *Cantor*, and *Goldfarb* involved private parties and were distinguishable; city immune); *Town of Hallie*, 700 F.2d at 383 (same); see Note, *supra* note 71, at 287-88; cf. Richards, *supra* note 38, at 309 ("willingness to distinguish between public and private defendants has allowed a broader range of *Parker* immunity for the public defendant"). But cf. Comment, *supra* note 35, at 1561 (*Midcal* defendant was public; *Midcal* standards apply to public defendants such as cities).

92. E.g., *Gold Cross Ambulance*, 705 F.2d at 1014-15 ("Because municipal officials generally are politically accountable to the citizens they represent . . . , state supervision is not as necessary to prevent abuse as in the private context"; state supervision could result in duplicative, wasteful regulation and erode local autonomy); see Cirace, *supra* note 29, at 490 ("Court's current test may restrict excessively the ability of states to delegate power to localities"); 1981 Term, *supra* note 78, at 272 (loss of municipal power has resulted from *Boulder*). See generally Freilich, Donovan & Rolls, *Antitrust Liability and Preemption Authority: Trends and Developments in Urban, State and Local Government Law*, 15 URB. LAW. 705, 707-37 (1983) (cataloging cases).

93. The *Parker* Court found no "purpose . . . to restrain a state or its officers or agents," 317 U.S. at 350, or "to nullify a state's control over its officers and agents," *id.* at 351; it distinguished between "private persons, individual or corporate" and states, concluding that the Sherman Act prohibited "individual and not state action." *Id.* at 352; see Blumstein & Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in a Constitutional Perspective*, 1978 DUKE L.J. 389, 414-16; cf. *Lafayette*, 435 U.S. at 426 (Stewart, J., dissenting) (*Parker's* principle is government/private persons distinction); *infra* notes 111-12 and accompanying text.

linedrawing was based on *federalism*—accommodating state and national powers. In this balance, cities have no place.⁹⁴ Rather, the Brennan opinions suggest that subordinate governmental units do not warrant immunity from the Sherman Act, a paramount federal law, unless the state considers their activities important enough to be affirmatively addressed and overseen.

II. IN DEFENSE OF *BOULDER*

Among commentators and the municipal bar, the doctrinal issues answered and unanswered in *Boulder* may have been eclipsed by issues not even before the Court—preemption, liability, and remedy. Like *Lafayette*, the *Boulder* decision provoked criticism and dire predictions. They focus on a perceived distortion of federalism principles⁹⁵ and bring out a parade of horrors: unrestrained review of city conduct by federal antitrust courts, state usurpation of municipal prerogatives of self-government, and cities crippled and bankrupted by an outpouring of private suits and treble damage judgments.⁹⁶

A. *The Issue Before the Court: Sovereign Immunity*

Opponents of municipal antitrust liability have assailed the *Lafayette-Boulder* premise that local governments do not command the same federal deference as states.⁹⁷ The *Boulder* dissenters, for example, identified one context where state and local action is not

94. *Boulder*, 455 U.S. at 50–51 (quoting *Lafayette*, 435 U.S. at 412–13); Richards, *supra* note 38, at 312–13; *cf.* Cirace, *supra* note 29, at 486–87 (majority of Supreme Court defined state action in terms of sovereign immunity; this principle “tends to exclude municipalities by definition, because they do not possess the attribute of sovereignty”).

95. *Boulder*, 455 U.S. at 61–64, 69–70 (Rehnquist, J., dissenting); Cirace, *supra* note 29, at 488; Civiletti, *The Boulder and Lafayette Decisions: Antitrust or Anti-Cities?*, in ANTI-TRUST & LOCAL GOVERNMENT 181 (J. Siena ed. 1982); Note, *supra* note 35, at 429.

96. *Boulder*, 455 U.S. at 60, 65–68, 70–71 (Rehnquist, J., dissenting); *see Local Government Antitrust Liability: Hearings Before the Senate Judiciary Comm.*, 97th Cong., 2d Sess. (1982) (summarized in *Cities Seek Antitrust Exemption in Response to Boulder Decision*, [1982 File Binder] ANTI-TRUST & TRADE REG. REP. (BNA) No. 1071, at 12–13 (July 1, 1982)); Cirace, *supra* note 29; Civiletti, *supra* note 78; Freilich & Carlisle, *supra* note 71; Spiegel, *supra* note 7; Williamson, *Commentary: The Reagan Administration's Position on Antitrust Liability of Municipalities*, 32 CATH. U.L. REV. 371 (1982); Note, *supra* note 71; Note, *supra* note 35; Comment, *supra* note 29; Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 GEO. WASH. L. REV. 145 (1982); 1981 Term, *supra* note 78, at 268–78; Comment, *Community Communications Co. v. City of Boulder: Denial of Parker Exemption to Home Rule Cities*, 1983 UTAH L. REV. 139; Recent Development, *Municipalities and the Antitrust Laws: Home Rule Authority Is Insufficient to Ensure State Action Immunity*, 35 VAND. L. REV. 1041 (1982).

97. *See, e.g., Boulder* 455 U.S. at 61–64, 69–70 (Rehnquist, J., dissenting); *Lafayette*, 435 U.S. at 429 (Stewart, J., dissenting); Civiletti, *supra* note 95, at 488; Freilich & Carlisle,

distinguished—federal preemption—and urged that *Parker v. Brown* be read in that vein.⁹⁸

1. *The Preemption Proposal*

Forcing *Parker* into a preemption mold would result in abandonment of the current state action test and preservation of municipal immunity.⁹⁹ But federal preemption focuses on the “collision” of state or local legislation with a federal statute,¹⁰⁰

supra note 71, at x-xii; Note, *supra* note 35, at 429; cf. 1981 Term, *supra* note 78, at 272-74 (advocating federalism defense to protect “traditional” or “core” municipal activities).

98. 455 U.S. at 60-65, 68, 70 (Rehnquist, J., dissenting). Justice Rehnquist attacked the term “exemption” as improper in the *Parker* context, *id.* at 60-61, arguing a fine doctrinal distinction between “exemption” and “preemption.” See Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1378-79 (1978), cited with approval in *Boulder*, 455 U.S. at 61 (Rehnquist, J., dissenting). The *Lafayette* Court had explained its use of “exemption” as simply “a shorthand expression” for the *Parker* doctrine. 435 U.S. at 393 n.8 (plurality opinion of Brennan, J.). Nevertheless, Justice Rehnquist used this argument as a basis for rereading *Parker* as a preemption case and abolishing the authorization and supervision formula. 455 U.S. at 61.

99. See 455 U.S. at 60 (Rehnquist, J., dissenting) (“The question addressed in *Parker* and in this case is . . . whether statutes, ordinances, and regulations enacted as an act of government are *pre-empted* by the Sherman Act under the operation of the Supremacy Clause.”) (emphasis in original). But see *First Am. Title Co. v. South Dakota Land Title Ass’n*, 714 F.2d 1439, 1451-55 (8th Cir. 1983). According to the Eighth Circuit, “[i]t is . . . self-evident that application of state action principles follows the antitrust court’s initial determination that there is truly a conflict between the Sherman Act and the challenged regulatory scheme.” *Id.* at 1451-52 (emphasis added). Viewing preemption and state action as two steps in the immunity inquiry produced an incredible result in *First American Title*—after a four-day bench trial on the substantive antitrust issues, 541 F. Supp. 1147, 1149 (D.S.D. 1982), the Eighth Circuit relied on defendants’ victory in the district court to hold that the challenged scheme was neither preempted nor reachable under *Parker*. By requiring that the preemption question be answered first, the court effectively demanded a liability trial (to determine existence of “irreconcilable conflict”; i.e., violation) before it could reach the *Parker* question!

100. Compare *Parker*, 317 U.S. at 350-51, with *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1941), and *id.* at 79-80 (Stone, J., dissenting). In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978), the Court summarized preemption analysis as two-stage. Initially, the Court must examine congressional intent to determine whether “Congress left no room for the States to supplement” federal regulation. *Id.* at 157 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The *Parker* Court did not undertake this analysis, but assumed without deciding that Congress had not done so. 317 U.S. at 350. According to *Ray*, the second inquiry follows if the first is answered in the negative:

Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found “where compliance with both federal and state regulations is a physical impossibility . . .,” or where the state “law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”

435 U.S. at 158 (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines*, 312 U.S. at 67). The *Parker* Court avoided this analysis as well. See *infra* notes 101-03 and accompanying text. For a discussion of preemption, see G. GUN-

and in *Parker* this collision was *assumed* and never analyzed.¹⁰¹ Chief Justice Stone, in a truncated congressional intent inquiry, never explored whether there was an "irreconcilable conflict" which would prevent California's raisin market legislation from coexisting with the Sherman Act.¹⁰² Rather, he sought to determine whether Congress had intended *to restrain state action*,¹⁰³ a posture which reflects sovereign immunity concerns.¹⁰⁴ In that context, cities have long been distinguished from states.¹⁰⁵

OTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 343-45 (10th ed. 1980); see also Richards, *supra* note 38, at 305 n.177; Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 GEO. WASH. L. REV. 145 (1982); 1981 Term, *supra* note 78, at 271 & n.25.

101. 317 U.S. at 350 ("We may assume for present purposes that the California prorate program would violate the Sherman Act . . .").

102. Chief Justice Stone never addressed or considered the "full purposes and objectives of Congress" as reflected in the Sherman Act. Rather, his examination was exceedingly narrow:

The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action. . . . The Act is applicable to "persons" . . . [and a] state may maintain a suit for damages under it. . . .

There is no suggestion of a purpose to restrain state action in the Act's legislative history. . . . [I]ts purpose was to suppress combinations . . . by individuals and corporations

317 U.S. at 351. The examination was also limited to the Sherman Act. Despite the Court's characterization of the complaint as "assail[ing] the validity of the program under the anti-trust laws," *id.* at 349 (emphasis added), the Court ignored the Clayton Act, 15 U.S.C. §§ 12-27 (1982), the Federal Trade Commission Act, *id.* §§ 41-58, and the Robinson-Patman Act, §§ 13-13b, 21a (enacted just six years before *Parker*, Pub. L. No. 74-692, 49 Stat. 1526 (1936)).

The total preoccupation with the state's ability to "control . . . its officers and agents" in *Parker* is illustrated by contrasting its inquiry with those in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232-38 (1947), and *Hines*, 312 U.S. at 69-74.

103. 317 U.S. at 351.

104. While sovereign immunity may have derived from Roman law, underlying the common law "seems to have been the theory, allied with the divine right of kings, that 'the King can do no wrong,' together with the feeling that it was necessarily a contradiction of his sovereignty to allow him to be sued . . . in his own courts." W. PROSSER, *supra* note 7, at 970. In the United States, this "feudal and monarchistic doctrine" was very early imported into federal, *id.* at 971 & nn.14-15, as well as state law, *id.* at 975. An abortive judicial effort to abolish state immunity (*Chisholm v. Georgia*, 2 U.S. (1 Dall.) 419 (1793)) resulted in passage of the 11th amendment. *Id.* at 975 & n.49.

According to Prosser, the following policies underpin state tort immunity: "[P]ublic policy; the absurdity of a wrong committed by an entire people"; the theory that the state can do no wrong; respondeat superior theory (where state is master, servant's torts are outside scope of employment); "reluctance to divert public funds to compensate for private injuries; and the inconvenience and embarrassment" to government. *Id.* at 975.

As used in this Note, the term "sovereign immunity" refers to the type of federal deference to states required by the 11th amendment to the Constitution. See *infra* notes 118-20 and accompanying text.

105. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); accord, *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); see *infra* note 120. One of preemption's advantages from the *Boulder* dissenters' viewpoint is its failure to make any distinction between state and municipal regulation. See 455 U.S. at 69-70 (Rehnquist, J.

Parker's brand of deference is not implicated¹⁰⁶ when one of thousands of local subunits, acting in its own parochial interests,¹⁰⁷ violates the broad procompetitive mandate of Congress.¹⁰⁸

2. The "Basically Irrelevant"¹⁰⁹ Eleventh Amendment Is the Proper Analog

Parker v. Brown makes the most sense when read as an eleventh amendment case.¹¹⁰ Its emphasis on the identity of the defendants as state officials¹¹¹ then becomes understandable: The public (or sovereign) character of defendants is a paramount concern in eleventh amendment jurisprudence.¹¹² Moreover, the

dissenting); Richards, *supra* note 38, at 306-07 & nn.184-87. As noted by Justice Rehnquist, preemption would perpetuate municipal antitrust immunity, *id.* at 68, since it would preserve the local enactment in most instances. See *infra* note 123 (discussing *Rice v. Norman Williams Co.*, 458 U.S. 654 (1982)). As commentators have observed, however, substituting preemption for the current state action test would subvert federal antitrust goals. See Lipsky, *The Justice Department Looks at Boulder*, in ANTITRUST & LOCAL GOVERNMENT 195-96 (J. Siena ed. 1982); 1981 Term, *supra* note 78, at 272 ("exercise of regulatory powers by sixty thousand municipalities might lead to 'the strangulation of nationwide businesses by a maze of conflicting local regulations and the frustration of national political objectives by local selfishness and protectionism.'") (quoting Frug, *supra* note 57, at 1067); *infra* notes 107-08 and accompanying text; cf. *Lafayette*, 435 U.S. at 406-08 (plurality opinion of Brennan, J.) (allowing numerous local subunits immunity would subvert antitrust goals).

106. See Note, *supra* note 71, at 282-83:

Although fairly compelling, Justice Rehnquist's analysis ultimately fails. While it may be true in other contexts that federalism does not distinguish between states and subdivisions of states, implicit in the federalism operative in *Parker* is such a distinction: the *Parker* principle is based upon the proposition that it is a state's status as sovereign that warrants the inference of immunity from the Sherman Act.

Id. at 283. But cf. Cirace, *supra* note 29, at 488, 497-99 (proposing modified preemption test).

107. See *Lafayette*, 435 U.S. at 412-13, quoted in *Boulder*, 455 U.S. at 50-51; Cirace, *supra* note 29, at 489 (*Lafayette* "Court recoiled at the prospect of allowing some sixty thousand units of local government the same freedom to initiate competitive displacements that [it allows states].")

108. As Justice Brennan wrote in *Boulder*, the city's "adverse consequences" argument was "simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." 455 U.S. at 56; see also *id.* n.19; *Lafayette*, 435 U.S. at 399-400.

109. *Lafayette*, 435 U.S. at 431 (Stewart, J., dissenting).

110. See *infra* notes 118-21 and accompanying text.

111. The *Parker* Court concentrated on party identity, not on the type of activity challenged. It was preoccupied with the state's relationship with its officers and agents, see *supra* note 102, and continually referred to "the state"—states, it pointed out, are "sovereign." 317 U.S. at 350-52 (emphasis added); see Blumstein & Calvani, *supra* note 93, at 416 (*Parker's* language neatly comports with 11th amendment's focus on party identity; *Parker* doctrine and 11th amendment are analogous but not coextensive).

112. Blumstein & Calvani, *supra* note 93, at 415-16 & n.150.

unique focus of Chief Justice Stone's intent inquiry reflects eleventh amendment values. Assuming that defendants' conduct violated the Sherman Act, and that Congress could have precluded all state economic regulation but did not,¹¹³ the *Parker* Court looked for other evidence of congressional intent to restrain or hinder states from implementing market controls.¹¹⁴ Finding none, the Court would imply none.¹¹⁵ This analysis compelled the ruling that defendants were *immune*; it did not involve a finding of no conflict between the California raisin prorate statute and the Sherman Act.¹¹⁶

The *Lafayette* and *Boulder* Courts have implicitly recognized the eleventh amendment's relevance to the *Parker* doctrine.¹¹⁷

113. See *supra* note 102. The cursory discussion of the Sherman Act and its history in *Parker* reveals that the Court's sole concern was with the federalism ramifications of finding an antitrust violation by a state. See 317 U.S. at 350-51 (repeated reference to "violate"). Moreover, the preemption inquiry was quickly glossed over: "Occupation of a legislative 'field' by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." *Id.* at 350. The Court apparently viewed Congress' failure to "preempt the field" as evidence that Congress never intended to "restrain state action." See *id.*

114. *Id.* at 350-51.

115. *Id.*

116. Compare *id.* (conclusory analysis of legislative intent stressing state sovereignty), with *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158-78 (1978) (conventional preemption analysis spanning 21 pages stressing conflict between statutes), and *Rice v. Norman Williams Co.*, 458 U.S. 654, 659-61 (1982) ("In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause.").

117. *Lafayette*, 435 U.S. at 412 (citing 11th amendment cases to support assertion that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them"), quoted in *Boulder*, 455 U.S. at 50. While Justice Stewart's *Lafayette* dissent attacked the plurality for relying "on the basically irrelevant body of law under the Eleventh Amendment," 435 U.S. at 430-31, even Justice Stewart emphasized that the key distinction in *Parker* cases involves the parties (public/private), not the type of activity (governmental/proprietary). See *supra* note 57 and accompanying text.

Blumstein & Calvani, *supra* note 93, have made a convincing historical argument that 11th amendment concerns were the major impetus for *Parker v. Brown*:

Justice Stevens . . . suggested that the Court in setting *Parker v. Brown* for reargument, was concerned about the impact of its contemporaneous decision in *Georgia v. Evans* [316 U.S. 159 (1943)], which had held a state to be a "person" within the Sherman Act and therefore entitled to maintain an action . . . [This] generated the logical next question—whether a state could in turn be sued and held liable . . .

Id. at 414 (discussing *Cantor*, 428 U.S. 579 (1976)). The authors continued:

Less than two years prior to . . . *Parker*, Justice Stone wrote the opinion in *United States v. Darby*, 312 U.S. 100 (1941), which sustained the constitutionality under the commerce clause of . . . the Fair Labor Standards Act . . . [T]he Court rejected a challenge bottomed on the tenth amendment . . . [S]o it is reasonable to infer that the federalism principles embodied in *Parker* . . . are derived from eleventh amendment principles.

The amendment,¹¹⁸ which shields states and state officials from federal court damage suits,¹¹⁹ does not apply to municipal corporations.¹²⁰ A county or other political subdivision may invoke eleventh amendment protection only by showing that, because of its close connection with the state, it is acting as "an arm of the State."¹²¹ The current state action test, with its focus on state policy and state involvement, comports with *Parker's* implicit eleventh amendment foundation. Justice Rehnquist's preemption alternative,¹²² on the other hand, not only misunderstands *Parker* but also would effectively blanket every city, town, suburb, county, and special purpose unit with antitrust immunity.¹²³ It

Id. at 416-17 n.156.

118. U.S. CONST. amend. XI provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Although on its face the amendment prohibits suits against states by noncitizens, the Supreme Court has extended its prohibition to suits by citizens against their own states. *Hans v. Louisiana*, 134 U.S. 1, 10-17 (1890); *accord*, *Cate v. Oldham*, 707 F.2d 1176, 1180 (11th Cir. 1983). For historical background, see Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); see also W. PROSSER, *supra* note 7, at 970-92 (governmental immunity; liability of public officers).

119. *Edelman v. Jordan* 415 U.S. 651 (1974); *accord*, *Cate v. Oldham*, 707 F.2d at 1180-81. *But see* FEDERAL SYSTEM, *supra* note 5, at 483 (suggesting that *Maine v. Thiboutot*, 441 U.S. 1 (1980), effectively overruled *Edelman* by permitting monetary recovery from state treasury in civil rights suit).

120. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The Court has explicitly distinguished cities from states in other contexts. *See Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (vote apportionment; "Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities."); *accord*, *Waller v. Florida*, 397 U.S. 387, 392 (1969) (double jeopardy).

121. *Mt. Healthy*, 429 U.S. at 280.

122. *See supra* note 98.

123. Subsequent to *Boulder*, the Supreme Court announced its test for antitrust preemption in *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). Writing for a unanimous Court, Justice Rehnquist stated:

[A] state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract.

Id. (emphasis added). Under the *Rice* formula, the Sherman Act would preempt state or local legislation only in the most extreme cases. If this test were substituted for the *Parker* doctrine, as Justice Rehnquist urged in his *Boulder* dissent, state and local regulation would be nearly impervious to federal antitrust review.

In *Rice*, Justice Rehnquist may have abandoned his campaign for displacing the *Parker* doctrine with preemption. He appeared to concede that the *Rice* preemption analysis is confined to facial challenges of state and local legislation. *Id.* at 661-62 & n.8. More

was precisely this potential for unwarranted infringement of federal antitrust goals that led the *Boulder* Court to extend *Lafayette* to all municipalities.¹²⁴

Substituting preemption for the *Midcal* test would compel far greater federal deference to states than that constitutionally due.¹²⁵ Such a result would be paradoxical in the context of the Sherman Act, a law so fundamental that the Court has extended it to its constitutional limits.¹²⁶ The special problems and needs of local government should be addressed at the violation stage, not categorically declared the basis for sweeping antitrust immunity.

B. *The Issue Not Before the Court: Liability*

Boulder's critics have raised a host of objections based on what they perceive to be the inevitable ramifications of municipal antitrust liability.¹²⁷ But because the case came to it on the threshold state action question only, the Court was in no posture to consider how the antitrust laws should be applied on the merits to "public" defendants.¹²⁸ Nor were other procedural defenses—jurisdiction,¹²⁹ standing to sue under the Clayton Act,¹³⁰ "antitrust in-

significantly, he confessed that preemption and *Parker* immunity are separate questions. *Id.* at 662–63 n.9.

124. See *supra* notes 107–08.

125. Congress could have displaced all anticompetitive state and local economic regulation under its commerce power. *Parker*, 317 U.S. at 150. Its failure to do so and silence on the subject in the Sherman Act placed a federalism limit on federal courts which resulted in the *Parker* doctrine. See *supra* notes 30–34 and accompanying text. The courts are not so constrained if municipal and not state action is involved. See *supra* note 94 and accompanying text.

126. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (Sherman Act reaches to extent of commerce power); see *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976) ("Sherman Act . . . [expands] along with expanding notions of congressional power").

127. E.g., *Boulder*, 455 U.S. 68–70 (Rehnquist, J. dissenting); Civiletti, *supra* note 95, at 182–84; Freilich & Carlisle, *supra* note 71, *passim*; Note, *supra* note 71, at 259–60; Note, *supra* note 35, *passim*. Problems regarding the treble damage remedy are addressed *infra* notes 194–233 and accompanying text.

128. *Boulder*, 455 U.S. at 56 n.20. In this highly suggestive footnote, the Court intimated that cities may be indistinguishable from private parties for immunity purposes but distinguishable for liability purposes:

This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants. As we said in *City of Lafayette*, "[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government."

Id. (quoting *Lafayette*, 435 U.S. at 417 n.48).

129. E.g., *McLain v. Real Estate Bd.*, 444 U.S. 232, 241–43 (1980) (Sherman Act jurisdiction requires "substantial effect on interstate commerce"); *United States v. American*

jury,"¹³¹ the various immunities available to public officials in other contexts¹³²—before the Court. The lower courts have thus been enlisted to work out these and other problems as they arise in litigation.¹³³

As Justice Stevens reminded the *Boulder* Court in his concurrence, the state action immunity question is absolutely divorced from the violation issues.¹³⁴ The *Parker* Court itself mandated this separation by *assuming a violation* for purposes of its inquiry.¹³⁵ Correctly, the *Boulder* majority remanded, leaving the district court to proceed as though the *Parker* question had never been raised.¹³⁶ Unmoved by the dissenters' dire predictions,¹³⁷

Bldg. Maintenance Indus., 422 U.S. 271, 275-76 (1975) (Clayton Act applies to firms "engaged in commerce"); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 193-201 (1974) (section 2(a) of Clayton Act, as amended by Robinson-Patman Act, requires evidence that activities are "in commerce"); see 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 231-40 (1978). According to one theory, the Court devised the *Parker* doctrine to counter its significant enlargement of the commerce power, and the corresponding enlargement of federal jurisdiction, during the 1930's. See *Kendrick v. City Council*, 516 F. Supp. 1134, 1140 (S.D. Ga. 1981); Note, *supra* note 35, at 413-14; cf. Blumstein & Calvani, *supra* note 93, at 414.

130. *E.g.*, *Reiter v. Sonotone*, 442 U.S. 330 (1979) (test for injury to "business or property"); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) (direct injury requirement); see *Parks v. Watson*, 716 F.2d 646, 659-61 (9th Cir. 1983) (in antitrust suit against city, plaintiff survived direct injury test but was required to prove injury to business or property on remand). See generally Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977) (proposing policy-balancing approach to achieve more systematic resolution of standing issues).

131. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

132. Most immunity cases have been decided by federal courts in the context of suits under 42 U.S.C. § 1983 (1976), for civil rights violations and so-called constitutional or statutory torts. See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978) (cataloging cases). Cities themselves cannot assert immunity to § 1983 actions, *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), but their officials may attempt to do so, see *Affiliated Capital Corp. v. City of Houston*, 700 F.2d 226, 237, *reh'g en banc granted*, 714 F.2d 25 (5th Cir. 1983) (city mayor unsuccessfully asserted qualified immunity to Sherman Act liability; court applied objective "good faith" test and rejected claim); cf. *Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 274 (9th Cir. 1982) (quoting 7 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 46.01 (1983) ("'Good faith actions of state officials are immune from attack under the antitrust laws if those officials act within the scope of their authority in the furtherance of a declared governmental policy or legislative scheme.'")).

133. 455 U.S. at 59-60 (Stevens, J., concurring).

134. *Id.* at 58-60.

135. 317 U.S. at 350.

136. The *Boulder* dispute was ultimately settled out of court. de Raismes, *The Boulder Case: Caveat Polis*, MUN. ATT'Y, Jan.-Feb. 1983, at 14, 17-18. Plaintiff cable company won a "buildout" of the entire city and a minimal, 15-year franchise. *Id.* at 17.

137. 455 U.S. at 56-57 (rejecting city's "adverse consequence" and "federal court burden" arguments). The dissent predicted that the "Court's decision . . . will . . . impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at pro-

the majority may have become skeptical¹³⁸ during the years after *Lafayette*—Justices Stewart and Blackmun had voiced similar fears about the impact of municipal antitrust liability and their dire predictions had not yet materialized.¹³⁹ It now appears that at least five Justices have chosen to subject cities to antitrust “as is,” and are waiting to see how lower courts respond to their implications that special liability rules might be devised.¹⁴⁰

1. *The Debate*

Boulder's unanswered questions regarding substantive antitrust law and cities have coalesced into three main issues. As to the first, the applicability of per se rules,¹⁴¹ commentators generally urge that government defendants be spared these “judicial shortcuts.”¹⁴² The remaining two issues involve application of the rule of reason:¹⁴³ whether cities may offer health, safety, and wel-

protecting public health, safety, and welfare,” *id.* at 60, urging that “[b]efore this Court leaps into the abyss and holds that municipalities may violate the Sherman Act . . . , it ought to think about the consequences,” *id.* at 68 (emphasis in original).

138. See 455 U.S. at 58 & n.1 (Stevens, J., concurring).

139. One commentator has noted that despite dire predictions of a flood of litigation and bankrupted cities which followed *Lafayette*, only 30 suits were filed against cities between 1978 and 1980 and none resulted in a final damage judgment. Spiegel, *supra* note 7, at 165; cf. *Boulder*, 455 U.S. at 58 n.1 (Stevens, J., concurring) (making similar observation about *Cantor*). The fears voiced regarding *Boulder* could prove to be overstated as well. Cf. Note, *supra* note 71, at 260 n.8 (as of mid-1982, only 43 out of 300 cities surveyed were defending antitrust suits).

140. See *supra* note 128.

141. The orthodox definition of per se illegality appears in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958): “[C]ertain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.” The condemned agreements or practices include price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), horizontal market division, *United States v. Topco Assocs.*, 405 U.S. 596 (1972), and (to a lesser degree) tying arrangements, *United States Steel v. Fortner Enters.*, 429 U.S. 610 (1977); *International Salt Co. v. United States*, 332 U.S. 392 (1947), and boycotts and concerted refusals to deal, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). For discussions of per se characterization, see *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342–44 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 691–92 (1978). Practices not deemed per se illegal are judged under the rule of reason. See *infra* note 143.

142. E.g., Spiegel, *supra* note 7, at 165; Sullivan, *supra* note 67, at 14; Note, *supra* note 71, at 296; Note, *supra* note 50, at 539 nn.158–59; Recent Development, *supra* note 96, at 1071. Per se rules are shortcut devices because they reduce the costs and complexities of judging business practices. *Maricopa*, 457 U.S. at 343–44 (plurality opinion of Stevens, J.); *United States v. Container Corp.*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

143. One classic statement of the rule of reason appears in *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.):

The true test of legality is whether the restraint imposed is such as merely regu-

fare justifications under existing precedent¹⁴⁴ and, if so, whether the flexible balancing of conventional rule of reason analysis would invite unrestrained review of municipal action.¹⁴⁵

In *Affiliated Capital Corp. v. City of Houston*, a Fifth Circuit panel invoked the per se rule forbidding horizontal market division against Houston's mayor.¹⁴⁶ Nonetheless, the importance of the debate over per se condemnation of city conduct has been somewhat overstated. As the *Affiliated* court pointed out, only a limited number of practices have been characterized as such.¹⁴⁷ Moreover, blind application of established per se rules is waning.¹⁴⁸ Were a court categorically to declare a municipal activity unlawful, the violation would almost certainly be particularly egregious, such as suborning a naked cartel.¹⁴⁹

Justice Rehnquist's overly strict interpretation of *National So-*

lates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

This definition is not without its critics, however. See, e.g., R. BORK, *THE ANTITRUST PARADOX* 41-47 (1978). Indeed, the content of rule of reason analysis has become a major battleground for the various "schools" of antitrust policy. See R. POSNER & F. EASTERBROOK, *ANTITRUST CASES, ECONOMIC NOTES AND OTHER MATERIALS* 152-71 (2d ed. 1981).

144. See *Boulder*, 455 U.S. at 65-67 (Rehnquist, J., dissenting); Civiletti, *supra* note 78, at 386-87; Sullivan, *supra* note 67, at 14-15; Susman & White, *supra* note 5, at 30; Vanderstar, *Liability of Municipalities Under the Antitrust Laws: Litigation Strategies*, 32 CATH. U.L. REV. 395, 398-99 (1983); Note, *supra* note 71, at 293; Note, *supra* note 35, at 432-33; Comment, *supra* note 29, at 51, 79-80; 1981 Term, *supra* note 78, at 274-75.

145. See *Boulder*, 45 U.S. at 65-67 (Rehnquist, J., dissenting); Civiletti, *supra* note 78, at 387; Williamson, *supra* note 96, at 377; Note, *supra* note 71, at 295-96 n.192; Note, *supra* note 35, at 433; Comment, *supra* note 29, at 81-82; 1981 Term, *supra* note 78 at 275; cf. Areeda, *supra* note 6, at 445, 453 (making same argument in *Lafayette's* wake).

146. 700 F.2d 226, 235-38, *reh'g en banc granted*, 714 F.2d 25 (5th Cir. 1983). The City of Houston had been dismissed as a party by stipulation. *Id.* at 237 n.15.

147. *Id.* at 236; see *supra* note 141.

148. See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 18-24 (1979) (price fixing); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (vertical location restriction); *United States v. National Ass'n of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982) (price fixing); cf. *Maricopa*, 457 U.S. at 342-54 (same); *United States v. Southern Motor Carriers Rate Conf.* 672 F.2d 469, 479-81 (5th Cir. 1982) (same).

149. See *Affiliated Capital*, 700 F.2d at 233, 236 (mayor "gave his blessing" to market division by Houston businessmen which constituted "naked restraint"); see also opinion below, 519 F. Supp. 991, 1016 (S.D. Tex. 1981) ("The actions of Mayor McConn were those of an active co-conspirator not content merely to accede to the wishes of private parties. In addition, the actions of the councilmen and other agents of the City demonstrate the City's vigorous involvement in orchestrating certain aspects of the conspiracy.").

ciety of Professional Engineers v. United States¹⁵⁰ has fueled debate over the permissible content of a city's rule of reason defense.¹⁵¹ Although the problem had been identified prior to *Boulder*,¹⁵² the dissenters exacerbated it by declaring that antitrust precedent prohibited all but procompetitive justifications.¹⁵³ In *Engineers*, the Court had rebuffed a private professional association's defense to price fixing, which was based on the premise that keeping prices high was essential to prevent cutthroat competition among engineers and its inevitable byproduct, unsafe construction.¹⁵⁴ In light of the Court's suggestive footnotes in *Boulder* and *Lafayette*, however, *Engineers*' "sweeping and somewhat misleading"¹⁵⁵ assertions can be easily limited to cases involving private self-regulation. The rule of reason could thus be recast to fit the context of municipal antitrust liability, a possibility acknowledged in the *Boulder* dissent.¹⁵⁶

150. 435 U.S. 679 (1978) (Stevens, J.), *quoted and explained in Boulder*, 455 U.S. at 65-66 (Rehnquist, J., dissenting). Justice Rehnquist read *Engineers* out of context. See *infra* note 153.

151. See *supra* note 144.

152. See Note, *supra* note 50, at 539 & n.158 (arguing that Sherman Act's breadth and judicially defined "exceptions to the competitive regime" permit rule of reason which encompasses "governmental interest defense").

153. 455 U.S. at 65-66. But see *Omega Satellite Prods. v. City of Indianapolis*, 694 F.2d 119, 126 (7th Cir. 1982) (Posner, J.):

Although there is language in some Supreme Court opinions, notably . . . *Engineers* . . . , to the effect that the only thing to consider in deciding whether a practice violates the Sherman Act is the effect on competition, it is unlikely that the Court meant to overturn the established proposition that the antitrust laws do not require the impossible—a competitive market under conditions of natural monopoly. . . . If a market has room for only one firm, it would be an effort worthy of King Canute to keep two firms in it.

Judge Posner has also cautioned that "*Engineers*' sweeping and somewhat misleading language regarding the scope of the Rule of Reason must be read in context. . . . Acceptance of [defendant's] argument could only have been predicated on a fundamental mistrust of consumer capabilities . . . that, if indulged by the Court, would have undermined the rule against price fixing." R. POSNER & F. EASTERBROOK, *supra* note 143, at 261. The "consumer ignorance" argument was also made and rejected in *Maricopa*, 457 U.S. 332 (1982).

154. 435 U.S. at 693-95.

155. R. POSNER & F. EASTERBROOK, *supra* note 143, at 261.

156. See 455 U.S. at 67. One commentator (a city attorney for Boulder) has already referred to "the new rule of reason suggested in footnote 20 of the Supreme Court's [*Boulder*] opinion." de Raismes, *supra* note 136, at 16. A body of precedent exists, especially in the boycott area, in which political and other noncompetitive considerations excused defendants from antitrust liability. For a catalog of these cases, see Springer, *Guarding Against Antitrust Risks*, in ANTITRUST & LOCAL GOVERNMENT 98 n.5, 106 & nn.25, 27 (J. Siena ed. 1982). Cf. *GTE Sylvania*, 433 U.S. at 55 n.23 ("Marketing efficiency is not the only legitimate reason for a manufacturer's desire [to impose restraints]. As a result of [legal] . . . developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. . . . The legitimacy of these concerns has been recognized in [rule of reason] cases . . .").

Yet, even as the dissenters lamented the prospect of subjecting cities to a rule of reason analysis without room for public benefit justifications, they argued that "rejecting the rationale of . . . *Engineers* to accommodate the municipal defendant opens up a different sort of Pandora's Box."¹⁵⁷ The purported evil is the rebirth of economic due process¹⁵⁸ in the guise of antitrust scrutiny. But the now-discredited use of the fourteenth amendment to "enact Mr. Herbert Spencer's Social Statics"¹⁵⁹ bears little similarity to the application of the antitrust laws to cities.¹⁶⁰ None of the municipal antitrust cases has involved attacks on social welfare legislation of the type invalidated in *Lochner v. New York*.¹⁶¹ Rather, they involve challenges to licensing, land use decisions and zoning, methods of supplying city services or conducting city-owned businesses, and granting of concessions and franchises.¹⁶² Furthermore, if the solicitousness displayed by courts in the state action cases¹⁶³ is any indication, antitrust review of such activities will probably be far less intrusive than feared.

In their eagerness to resolve the substantive issues in favor of cities, commentators have devised various liability tests which all but ignore antitrust. These include abandoning per se treatment of city conduct¹⁶⁴ and modifying the rule of reason to permit a

157. 455 U.S. at 67.

158. See *Lochner v. New York*, 198 U.S. 45 (1905); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 803 (1978).

159. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

160. As Justice Holmes observed, "[s]ome . . . laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory . . ." *Id.* (emphasis added). Unlike a constitution, the Sherman Act is a congressional fiat embodying principles that originated with Congress, and is supported by nearly a century of interpretive precedent. See Sullivan, *supra* note 67, at 9 ("Antitrust is basically a commitment to maintain competition. It has been American policy now for nearly a century."). Although some have ascribed a constitutional breadth to the Sherman Act, the courts are obliged to respond to Congress' will and cannot take blame for the lack of precision in the statute's drafting. See *Lafayette*, 435 U.S. at 398 & n.16; R. BORK, *supra* note 143, at 408-18. The evil of judicially created economic rights exemplified by *Lochner* is not present in antitrust. Note, *supra* note 71, at 296 n.192; cf. Cirace, *supra* note 29, at 484-85 (advocating substantive due process standard for determining state action immunity).

161. 198 U.S. 45 (1905) (fundamental "liberty of contract" guaranteed by 14th amendment invoked strict scrutiny of state statute restricting bakers' hours; in striking down statute as infringing liberty of bakers' employers, Court thereby countenanced sweatshops).

162. See generally ANTITRUST & LOCAL GOVERNMENT 93-177 (J. Siena ed. 1982) (collection of essays focusing on particular local government activities to which antitrust has been applied).

163. See *supra* notes 78-92 and accompanying text.

164. See *supra* note 142.

federalism defense for "traditional" municipal functions,¹⁶⁵ a "public policy" defense (which "would apply if an anticompetitive municipal regulation bore a rational relationship to a 'legitimate local purpose'" and its effects do not "clearly [outweigh] its putative local benefits"),¹⁶⁶ or a "public welfare" defense (requiring "proof that a restraint . . . is rationally related to the municipality's authorized police powers, . . . is nondiscriminatory in effect, and . . . [has] no viable less restrictive alternative").¹⁶⁷ Such proposals are vague, troublesome to apply, and unnecessary. Existing antitrust law already provides the tools for accommodating the special role of cities.

2. *The Solution: United States v. Addyston Pipe & Steel Co.*¹⁶⁸

A scant eight years after Congress passed the Sherman Act, the Sixth Circuit produced what Judge Robert Bork has called "one of the law's most brilliantly suggestive and neglected opinions" and "one of the greatest, if not the greatest, antitrust opinions in the history of the law."¹⁶⁹ Due largely to his influential explication and praise, the *Addyston* doctrine of "naked" and "ancillary" restraints, after surviving a seventy-year burial in antitrust casebooks, has had glimmers of its wisdom surface in recent Supreme Court opinions.¹⁷⁰ As in the case of licensing musical

165. 1981 Term, *supra* note 78, at 273-74.

166. *Id.* at 274-76; see also Note, *supra* note 50, at 539 (proposing three-pronged governmental interest defense: city must show (1) "that the activity furthers a legitimate, competing governmental interest"; (2) "that the means chosen . . . do not have an unreasonable anticompetitive impact"; and (3) that the means "substantially further the governmental purposes asserted").

167. Note, *supra* note 71, at 293-95.

168. 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

169. R. BORK, *supra* note 143, at 21, 26.

170. Ironically, *Engineers* is one of these. 435 U.S. at 689 ("The Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction . . ."). Unfortunately, the Court went on to state "that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id.* at 691 (relying on *Chicago Board of Trade*, 246 U.S. 231, 238 (1918)). The Court thus misunderstood the key contribution of *Addyston*—that an ancillary restraint is one that *promotes efficiencies or otherwise effectuates the purpose of a legitimate transaction*. See R. BORK, *supra* note 143, at 28.

The other Supreme Court case to draw upon the doctrine of naked and ancillary restraints, *Broadcast Music, Inc. v. CBS*, did so without explicitly acknowledging reliance on *Addyston*. 441 U.S. 1, 18-20 (1979). There, the Court correctly perceived the true distinction between naked restraints (those "with no purpose except stifling of competition," *id.* at

compositions,¹⁷¹ Judge Taft's concept of ancillary restraints is uniquely suited to evaluating the legality of municipal conduct.¹⁷²

The *Addyston* analysis, as distilled into modern terms by Judge Bork, looks initially to the purpose of the main transaction to determine whether the challenged restraint is the "sole object"¹⁷³ of the parties, or "subordinate and collateral to a separate, legitimate transaction," making that transaction "more effective in accomplishing legitimate purposes."¹⁷⁴ If the sole object, the anticompetitive conduct is deemed a "naked restraint" and condemned as illegal per se.¹⁷⁵ Under this inquiry, most city conduct would escape application of the per se rules,¹⁷⁶ which should allay some of

20) and ancillary restraints ("market restraints reasonably necessary to effectuate the rights that are granted [by copyright]," *id.* at 19). See *infra* notes 174-75 and accompanying text.

171. *Broadcast Music*, 441 U.S. 1 (1979). The sole inquiry before the Court was whether ASCAP and BMI's system of blanket licensing (as opposed to per-use licensing) constituted a per se violation of § 1 of the Sherman Act—illegal price fixing by copyright owners. *Id.* at 18. The analysis employed in *Broadcast Music* thus mirrored *Addyston's* initial characterization inquiry, see *id.* at 18-19, and its subsequent focus on effect, see *id.* at 19-24.

172. Cf. Shenefield, *Best Cases and Worst Cases*, in ANTITRUST & LOCAL GOVERNMENT 126 (J. Siena ed. 1982) ("[E]ven if a perfectly sensible governmental purpose exists, the conduct will be examined in terms of whether the collateral restraints exceed that lawful main purpose.").

173. *Addyston*, 85 F. at 282-83.

174. R. BORK, *supra* note 143, at 27.

175. *Id.* Considerable confusion surrounds the label to be attached to the *Addyston* analysis—whether it reflects merely the *characterization* of conduct (as a per se offense or one requiring rule of reason scrutiny) or whether the analysis itself constitutes a rule of reason. The Court in *Broadcast Music* believed it was engaged solely in characterization. 441 U.S. at 19 & n.33. Actually, the *Addyston* test as explicated by Judge Bork subsumes a portion of the rule of reason inquiry: the examination of purpose and effect. Restraints which pass the purpose and effect tests would be subjected "to the other tests of the rule of reason: market share and specific intent." R. BORK, *supra* note 143, at 267 (emphasis added). For clarity's sake, the analysis presented in this Note avoids the "characterization" and "rule of reason" dichotomy by viewing the proposed standard as a single test. A practice not alleged as unlawful per se would thus escape the initial question whether the restraint is "naked."

176. Municipalities should have no difficulty surviving this limited ends analysis by showing that the purpose of the main transaction is a "public purpose" or furthers the health, safety, and welfare of its citizens. See F. MICHELMAN & T. SANDALOW, *supra* note 72, at 110; cf. Note, *supra* note 50, at 540 ("review of governmental purposes should be quite limited"). But cf. 1981 Term, *supra* note 78, at 275 & n.47 ("incantation of a purpose to promote the health or safety" should not completely insulate local governments from antitrust scrutiny" (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981))).

Demonstrating that the challenged restraint is subordinate or collateral and furthers the main purpose might be modeled on *Broadcast Music*. There, defendants demonstrated that the copyright laws and market practicalities required arrangements whereby numerous copyright holders could deal with and enforce their rights against multitudes of users. 441 U.S. at 18-21 & nn.29, 33. Compare *Boulder*, 455 U.S. at 45-46, 47 n.10 (city imposed

the fears voiced in the *Boulder* dissent. Simultaneously, the rules' utility would be preserved for use against truly "pernicious" naked restraints.¹⁷⁷

The next stage of the *Addyston* analysis gauges the effect of those restraints which are not the sole object of the transaction. To survive, the restraint must "be no broader than the need it serves."¹⁷⁸ Again, the purpose of the main transaction becomes the focus, "suggest[ing] the measure of protection needed, and furnish[ing] a sufficiently uniform standard" for judicial determination.¹⁷⁹ Yet, even those restraints deemed ancillary may be condemned under the *Addyston* rationale if they are part of an overall monopolization scheme.¹⁸⁰ Thus, in Judge Bork's words, the *Addyston* "doctrine of naked and ancillary restraints offer[s] the Sherman Act a sophisticated rule of reason, a method of preserving socially valuable transactions by defining the scope of an exception for efficiency-creating agreements."¹⁸¹

The *Addyston* test's focus on the purpose of the underlying transaction would enable "public benefit" to enter the inquiry at the outset. To avoid per se treatment, a city need only show that its purpose in instituting the anticompetitive displacement is providing a lawful benefit to the public,¹⁸² and that the restraint is

moratorium because "petitioner's continued expansion during the drafting of the model [cable television] ordinance would discourage potential competitors from entering the market"; district court held no per se violation appeared before it), with *Affiliated Capital*, 700 F.2d at 228-30, 236 (city permitted group of local businessmen to divide up cable market among themselves, which "served only to eliminate competition"; per se violation). The application of the "naked restraint" criteria would abolish anticompetitive regulations which aid only private interests with no benefit to the public. Cf. Note, *supra* note 71, at 297 (violation shown where city conspired with private business because no public service rationale exists); Note, *supra* note 50, at 543 (municipal regulation may serve little or no public interest).

177. The utility of per se categorization has long been recognized. See *supra* note 142.

178. R. BORK, *supra* note 143, at 266. This requirement should not be confused with the "least restrictive alternative" requirement imposed by some courts as part of the rule of reason inquiry. See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 630 F.2d 262, 303-04 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). But see *GTE Sylvania*, 433 U.S. at 55 n.29; see also *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 694 F.2d 1132, 1138 n.11 (9th Cir. 1982) (same case on appeal from Supreme Court's remand).

179. R. BORK, *supra* note 143, at 28 (quoting *Addyston*, 85 F. at 282).

180. *Id.*; see *Addyston*, 85 F. at 291; cf. *Lafayette*, 435 U.S. at 404, 405 n.31, 417.

181. R. BORK, *supra* note 143, at 30. Judge Bork acknowledged, however, that the ancillary restraint doctrine is not the totality of rule of reason inquiry, since even ancillary restraints must still be tested for power and intent. *Id.* at 267.

182. See *Addyston*, 85 F. at 287 (emphasis added):

The main purpose of such [exclusive dealing] contract is to furnish sleeping-car facilities to the public. The railroad company may discharge this duty itself to the public, and allow no one else to do it, or it may hire some one to do it, and, to

subordinate or collateral to accomplishing that purpose.¹⁸³ Then, to assure the legality of its conduct under the ancillary restraint doctrine, a city must demonstrate that the restraint does not exceed what is reasonably necessary to accomplish its purpose.¹⁸⁴ This analysis would conceivably validate all vertical restraints,¹⁸⁵ while ancillary horizontal restraints would be subject to the additional tests of market share and specific intent.¹⁸⁶

secure the necessary investment of capital in the discharge of the duty, may secure to the sleeping-car company the same freedom from competition that it would have itself in discharging the duty. *The restraint upon itself is properly proportioned to, and is only ancillary to, the main purpose of the contract, which is to secure proper facilities to the public.*

Judge Bork has interpreted this language as validating all vertical arrangements. R. BORK, *supra* note 143, at 29 (emphasis added). It would certainly validate awards of exclusive franchises in potential natural monopoly situations. See *Omega Satellite Prods. v. City of Indianapolis*, 694 F.2d 119, 126-27 (1982) (Posner, J.); *cf. Affiliated Capital*, 700 F.2d at 234 (requiring competition *before* franchise is granted).

183. This requirement would prevent a city from imposing restraints solely to enhance revenues, for although enhanced revenues undoubtedly benefit the public, their achievement would not be collateral or subordinate but would constitute the main purpose or "sole object" of the restraint. *Cf. Kurek v. Pleasure Driveway & Park Dist.*, 557 F.2d 580 (7th Cir. 1977), *vacated and remanded*, 435 U.S. 992, *reinstated per curiam*, 583 F.2d 378 (1978), *cert. denied*, 439 U.S. 1090 (1979); Note, *supra* note 50, at 540.

184. R. BORK, *supra* note 143, at 266; see *Addyston*, 85 F. at 282 ("[I]f the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly."); *cf.* Note, *supra* note 50, at 540-41 (city must show its "objectives could not be furthered as effectively through competitive means"). Judge Bork explained this requirement as one of efficiency-creating economic integration, so that "lawyers forming a partnership," for example, "could lawfully agree on fields of exclusive specialization (which is market division) and the fees each should charge (price fixing), while the same lawyers, if they were not in partnership, could not do these things lawfully." R. BORK, *supra* note 143, at 28. While admitting that efficiencies may result from naked agreements and that integration may accompany them, Judge Bork concluded that these "may safely be ignored as either nonexistent or de minimis, . . . [and] are very unlikely to survive the test of market power or the test of intent." *Id.* at 268. *But cf. Euster v. Eagle Downs Racing Ass'n*, 677 F.2d 992, 997 (3d Cir. 1982) ("The district court would not be justified in looking into the wisdom or efficiency of using the [state] regulation in question as a means of accomplishing the intended objectives.").

185. R. BORK, *supra* note 143, at 29 (conceding that current antitrust law is otherwise).

186. *Id.* at 267, 268; see *Addyston*, 85 F. at 291 (even in cases where economic integration exists, restraint not "saved . . . from invalidity" if "actual intent to monopolize . . . appear[s]"); R. POSNER & F. EASTERBROOK, *supra* note 143, at 261 (growing trend in lower federal courts to require proof of relevant market in rule of reason cases and dismiss if defendant has small market share). Thus, if an ancillary restraint, proper in other respects, is instituted with predatory intent, it could be deemed unlawful. *Cf. Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 746 (8th Cir. 1982) (conspiracy to thwart normal zoning procedures and directly injure plaintiffs); *Mason City Center Ass'n v. City of Mason City*, 671 F.2d 1146 (8th Cir. 1982) (same); *Corey v. Look*, 641 F.2d 32 (1st Cir. 1981) (conspiracy to subvert normal commercial bidding to exclude plaintiff, coupled with use of zoning for similar purpose).

Absent a strict and unwarranted application of *Engineers* to municipal defendants, noncompetitive justifications would be factored into *Addyston*'s rule of reason equation. Indeed, characterizing restraints as naked or ancillary, and determining whether they are no broader than the need they serve, mandate reference to the city's main purpose in imposing them.¹⁸⁷ It is erroneous to conclude that *enhancing competition* is the only permissible goal justifying restraints—*Addyston*'s rationale (and Judge Bork) have unequivocally included the "purpose . . . to secure proper facilities to the public."¹⁸⁸ A restraint would be upheld if it enables efficient provision of public services or benefits, and is "properly proportioned to" that goal.¹⁸⁹

Besides providing a useful framework for reevaluating the traditional per se offenses and accommodating public purposes, the *Addyston* analysis is sufficiently focused to prevent overintrusive judicial review. At the same time, the test is neither excessively deferential to municipalities, as is federal preemption,¹⁹⁰ nor potentially overintrusive, as are the proposed tests modeled on commerce clause review of state regulation.¹⁹¹ Moreover, the *Addyston* test derives from antitrust law and has already been explored by antitrust courts. Its use in municipal antitrust cases would resolve the anomaly of treating cities as private parties for state action immunity purposes and as public for purposes of substantive antitrust scrutiny.¹⁹² Finally, the *Addyston* approach would eliminate the uncertainty, potential unfairness, and costly commitment of judicial resources involved in developing a separate body of municipal antitrust law.¹⁹³

III. THE TREBLE DAMAGE REMEDY: AN ISSUE FOR CONGRESS

Perhaps the most strenuous criticisms of municipal antitrust liability have been voiced in the context of the antitrust penalties,¹⁹⁴ specifically, the treble damage and attorney's fee provision

187. See *supra* note 182.

188. *Addyston*, 85 F. at 287, quoted in R. BORK, *supra* note 143, at 29; see *supra* note 153.

189. *Addyston*, 85 F. at 287, quoted in R. BORK, *supra* note 143, at 29.

190. See *supra* notes 123–25 and accompanying text.

191. See *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (intrusive review); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (same). But see *Minnesota v. Clover Leaf Creamery Corp.*, 449 U.S. 456 (1981) (extreme deference).

192. See *supra* note 128.

193. See *supra* notes 164–67 and accompanying text.

194. While the private treble damage action, 15 U.S.C. § 15 (1982), is the overriding

for private litigants.¹⁹⁵ This outrage¹⁹⁶ reflects a deep awareness that the treble damage remedy is overharsh, overblunt, and potentially debilitating. Since antitrust judgments have been notoriously large¹⁹⁷ and the cost of litigation fabled,¹⁹⁸ the doomsday scenarios¹⁹⁹ may not be farfetched. Yet, for all their validity, the objections have been too narrowly confined—the negative effects of treble damage liability cut across the public/private line.

A. *The Public/Private Distinction*

Opposition to municipal antitrust liability in general, and the furor over the treble damage issue, stem from a notion that penalties appropriate to deter private conduct somehow become intolerable when that conduct is public. While local government decisionmaking is to be shielded from the “chill” of in terrorem damage suits,²⁰⁰ corporate management is left out in the cold. While fiscal havoc may be wreaked on blameless investors and employees, cries go up in defense of the innocent taxpayer.²⁰¹ Public officials serve the public, corporate managers do not,²⁰² in-

concern in municipal antitrust literature, the antitrust laws also provide for private actions for equitable relief, *id.* § 26, Justice Department suits for criminal penalties, *id.* §§ 1–2, and/or equitable relief, *id.* §§ 4, 25, and Federal Trade Commission cease and desist orders, *id.* §§ 21(b), 45(b).

195. *Id.* § 15; see *supra* note 17.

196. *E.g.*, *Lafayette*, 435 U.S. at 440–41 (Stewart, J., dissenting), 442–43 (Blackmun, J., dissenting); Areeda, *supra* note 6, at 435; Civiletti, *supra* note 78, at 385–86; Howard, *supra* note 29, at 38; Shenefield, *The Parker v. Brown State Action Doctrine and the New Federalism of Antitrust*, 51 ANTITRUST L.J. 337, 345–46 (1982); Spiegel, *supra* note 7, at 166; Note, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant?*, 1980 ARIZ. ST. L.J. 441.

197. See *Lafayette*, 435 U.S. at 442–43 (Blackmun, J., dissenting); Civiletti, *The Boulder and Lafayette Decisions: Antitrust or Anti-Cities?*, in ANTITRUST & LOCAL GOVERNMENT 183–84 (J. Siena ed. 1982); Note, *supra* note 196, at 414–15.

198. See *Lafayette*, 435 U.S. at 440–41 & n.31 (Stewart, J., dissenting); K. ELZINGA & W. BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 72–77 (1976); Howard, *supra* note 29, at 38.

199. *E.g.*, *Lafayette*, 435 U.S. at 440–41 (Stewart, J., dissenting) (“A judgment of this magnitude would assure bankruptcy for almost any municipality The prospect of a city closing its schools, discharging its policemen, and curtailing its fire department in order to defend an antitrust suit would surely dismay the Congress that enacted the Sherman Act.”).

200. See, *e.g.*, *Boulder*, 455 U.S. at 60 (Rehnquist, J., dissenting); FEDERAL SYSTEM, *supra* note 5, at 493; Areeda, *supra* note 6, at 439, 451; Civiletti, *supra* note 78, at 387.

201. See, *e.g.*, *Lafayette*, 435 U.S. at 441 & n.32 (Stewart, J., dissenting); Civiletti, *supra* note 78, at 385–86; Note, *supra* note 196, at 416–17; Note, *supra* note 50, at 548–49; 1981 Term, *supra* note 78, at 276.

202. See *supra* note 200.

vestment is voluntary, taxes are not;²⁰³ employment is fungible, residence is not.²⁰⁴

These arguments are grounded in a dichotomy which arose primarily through developments in legal doctrine aimed at protecting private property rights.²⁰⁵ The public/private distinction ensured legal protection for the "private" corporation and justified state restraint of the municipal corporation.²⁰⁶ Yet "developments in the twentieth century have significantly undermined the 'privateness' of major business corporations, with the result that the traditional bases for distinguishing them from public corporations have largely disappeared."²⁰⁷ The distinction between public and private managers has been eroded by the rise of the "corporate conscience" and the imposition of statutory controls on official conduct.²⁰⁸ Moreover, corporate shareholders might have less control over asset management than taxpayers,²⁰⁹ who have access to the political process.²¹⁰ The voluntary/involuntary distinction has been convincingly rebutted,²¹¹ as has the notion that the functions of public and private corporations can be differentiated.²¹² Therefore, instead of confining criticism of the treble damage remedy to the municipal antitrust liability context, atten-

203. See, e.g., Note, *supra* note 196, at 417; Note, *supra* note 50, at 549 n.217; 1981 Term, *supra* note 78, at 276.

204. See Note, *supra* note 50, at 549 n.217.

205. Frug, *supra* note 57, at 1101-05, 1130.

206. *Id.* at 1105-20.

207. *Id.* at 1129. But see Durchslag, Salyer, Ball, and Holt: *Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1, 7 & n.34 (1982) ("sanctioned possession of redistributive powers is unique to public bodies").

208. Frug, *supra* note 57, at 1131-32. According to Professor Frug, to label the individual in civil society (such as in a private corporation) "private" and a state employee "public" is to divide those who can lead an earthly life of economic gain from those who must regard themselves as communal beings and act in a heavenly fashion. This vision still retains a powerful influence on our thinking. It delegitimizes political activity since political behavior, of necessity, falls far short of a heavenly standard.

Id. at 1131.

209. Cf. *id.* at 1130 (except for ability to sell, shareholders resemble taxpayers); D. VAGTS, BASIC CORPORATION LAW 371 (2d ed. 1979) (Although in theory shareholders have ownership control, "[b]etween the theory and the reality falls the shadow of certain awkward facts which indicate that such shareholder control is—at least in many cases—purely fictional.").

210. This, however, would not be true where municipal decisionmaking has extraterritorial impact. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978).

211. Frug, *supra* note 57, at 1133-36. Professor Frug's rebuttal is (1) that all exercise of economic power, whether by government or private persons, is coercive; and (2) that the decision to live and work in a particular city is no less voluntary than the decision to invest in or work for a particular corporation.

212. *Id.* at 1137-38.

tion should shift to the real issue—the weaknesses and drawbacks of the remedy itself.

B. *The Proposed Amendment*

Scholars have ably demonstrated that the private remedy spelled out in section 4 of the Clayton Act has destructive negative effects which outweigh its perceived benefits. Briefly, the list of negative effects includes: (1) weakening or eliminating the incentive for consumers to minimize their damages,²¹³ (2) encouraging nuisance suits,²¹⁴ (3) misallocating a costly and scarce resource, the judicial system,²¹⁵ (4) sapping corporate energies,²¹⁶ (5) “softening” competitive vigor by discouraging risktaking,²¹⁷ (6) promoting the “quiet life” by forcing settlements among rivals,²¹⁸ and (7) general unfairness to defendants.²¹⁹ Now that *Boulder* and the fiscal plight of cities have brought these considerations to the forefront, Congress should seriously consider amending the remedy it adopted in 1890.²²⁰

The amendment proposed here is simple: deletion of “threefold” from the damage language of section 4, and insertion of “in the discretion of the court” directly preceding the cost and attorney’s fee language.²²¹ These alterations would reduce recovery to actual damages²²² and bring private antitrust suits in line with the American rule on litigation expenses.²²³ This would work a com-

213. K. ELZINGA & W. BREIT, *supra* note 198, at 184–90.

214. *Id.* at 90–95.

215. *Id.* at 95.

216. Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1354.

217. *Id.* at 1360–62, 1369–70.

218. *Id.* at 1370–72.

219. 2 P. AREEDA & D. TURNER, *supra* note 129, ¶ 331(b) (1978).

220. The Sherman Act initially contained the treble damage provision, ch. 647, § 7, 26 Stat. 209, 210 (1890); this section was superseded by section 4 of the Clayton Act, Pub. L. No. 63–323, 38 Stat. 730, 731 (1914) (codified at 15 U.S.C. § 15 (1982)).

221. Section 4 would thus read: “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover [threefold] the damages by him sustained, and, *in the discretion of the court*, the cost of suit, including a reasonable attorney’s fee.” (bracketed material has been deleted, italicized material is new).

222. See Shenefield, *supra* note 196, at 346–47 (advocating legislation reducing § 4 recovery to single damages); *Reagan Administration Approves Proposal for Antitrust, Intellectual Property Bill*, [1983] ANTITRUST & TRADE REG. REP. (BNA) No. 1108, at 681 (Mar. 31, 1983) (summarizing cabinet-approved legislative proposal that would reduce recovery under § 4 to actual damages in cases not involving per se violations); *id.* at 713 (reprinting proposed amendment to § 4).

223. See K. ELZINGA & W. BREIT, *supra* note 198, at 72 (“Since the legal system of the

promise between advocates of abolishing the private damage remedy in favor of exclusive government enforcement²²⁴ and proponents of preserving the existing section 4 for its punitive,²²⁵ compensatory²²⁶ and "private attorney general" functions.²²⁷

While beguiling proposals for a judicially defined exception to section 4 have been advanced,²²⁸ they suffer from three fundamental defects. The first lies in the absence of standards for determining which defendants merit an exception, and when.²²⁹ The second lies in the mandatory language of section 4 and the questionable use of "judicial gymnastics"²³⁰ to circumvent it. The third lies in the magnitude of the issue and the impropriety of

United States generally does not provide for the successful litigant to receive payment for legal expenses from the losing party, [§ 4's] provision is somewhat peculiar to antitrust.").

224. See, e.g., *id.* at 139 ("The solution to the problem of efficient antitrust enforcement is the replacement of the present reparations-induced private action system by public enforcement armed with the single device of an optimal fine."); see also Austin, *supra* note 216, at 1372-73 (supporting exclusive government enforcement but indicating that given current trend in Congress, measure unlikely to materialize).

225. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 447, 485 (1977) ("treble damages also play an important role in penalizing wrongdoers"); 2 P. AREEDA & D. TURNER, *supra* note 129, ¶ 311(b).

226. See *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) ("treble damages serve as a means of deterring antitrust violations and of compensating victims"); *Brunswick*, 429 U.S. at 486 (treble damage provision designed primarily as remedy); Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 42-43 (criticizing Professors Breit and Elzinga for ignoring compensatory purpose of antitrust, and attacking proposals to cut back on treble damages).

227. See *Hydrolevel*, 456 U.S. at 575 ("Treble damages 'make the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit'' under the antitrust laws.") (quoting *Brunswick*, 429 U.S. at 486 n.10 (quoting Senator Sherman)); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 472-76 (deterrence, rather than compensation, is primary function of treble damage action).

228. See Note, *supra* note 196, at 421-31 (proposing rationales and methods for achieving municipal treble damage immunity); Note, *supra* note 50, at 544-49 (same); Recent Development, *supra* note 96, at 1072-75 (unless preemption test adopted, plain meaning of antitrust laws will be distorted by relieving cities of treble damage liability); cf. *Boulder*, 455 U.S. at 68 n.4 (Rehnquist, J., dissenting) (extolling preemption analysis as means of avoiding problem of damage remedy).

229. See Note, *supra* note 196, at 421-31 (failing to define class of "municipal defendants" eligible for proposed damage immunity, or to address eligibility of nonmunicipal governments); Note, *supra* note 50, at 549 (absent finding that Congress did not intend treble damage awards against municipalities, courts would determine on case-by-case basis whether damages are "unconstitutionally excessive").

230. *Boulder*, 455 U.S. at 65 & n.2 (Rehnquist, J., dissenting); *Grayson Elec. Co. v. Sacramento Mun. Util.*, 526 F. Supp. 276, 281-82 (E.D. Cal. 1981) ("Section 4 explicitly mandates the award of treble damages without respect to the status or identity of the wrongdoer. This Court is without the power to rewrite Section 4 of the Clayton Act.").

permitting courts to resolve it case by case.²³¹ As the Supreme Court has recognized in a related context,²³² such statutory alterations should be made by Congress. "Courts that refuse to make basic policy choices for the legislature thereby force the legislature to face and decide questions they had previously been content to leave unanswered. In this way the courts help focus the issues . . . and make the legislative process more responsible."²³³ Amending section 4 of the Clayton Act would, in turn, make antitrust enforcement more responsible, and solve *Boulder's* thorniest unanswered question in the process.

IV. CONCLUSION

After *Boulder*, municipal antitrust immunity survives subject to the current state action test. Pro-city outcomes in lower courts have somewhat blunted initial criticism of the Supreme Court's stance. Courts should not, however, distort the state action test merely to avoid the issues of substantive liability and remedy. Rather, they should face the liability issue and develop a principled review mechanism to ensure fairness to city defendants. This Note offers the *Addyston* test as such a mechanism. So that courts are not deterred from finding municipal antitrust violations when warranted, Congress should amend section 4 of the Clayton Act. If, as this Note suggests, the existing remedy affronts notions of fairness and efficiency, Congress should eliminate treble damages not just in favor of cities but in all private actions.

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231. See *Grayson*, 526 F. Supp. at 282; cf. *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981) ("The choice we are urged to make [existence of contribution right among antitrust violators] is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot.") (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)).

232. *Texas Industries*, 451 U.S. at 643-47 (Congress proper body to create right of contribution under § 4).

233. R. BORK, *supra* note 143, at 83.